No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

CALVIN SIMS, RICHARD ALLEN, FRANK ROGERS, BILLY LEE WILLIAMS, WALTER LEE, BOYD SLAGER, PETER GEORGE MILLS, LEE D. WALKER, CLEMONT DEDEAUX, ORDELL VILBURN, WILLIAM CLEARY, HERBERT WILLIAMS, FRED HOLNAGEL, BENNY SPELLS, KENNETH INMAN, RAYMOND L. BAILEY, ORCEAN DAVIS, JERRY MACK, BOYD KELTON, THOMAS H. LORD, RALPH WATSON, CHESTER A. SAWICKI, PHILLIP McGHEE, VERNON D. MEVIS, RALPH R. WARNER, RONALD D. KENNEDY, PAUL ROSS, HERMAN HEAD, GERALD G. NORMAN, PAUL MILLER, THOMAS U. MULLIGAN, LONNIE PAYNE, ROBERT MASON, GAYLORD L. ESPICH and KENNETH R. MARSHALL,

Petitioners,

vs.

PARKE DAVIS & Co., a Michigan Corporation, THE UPJOHN Co., a Delaware Corporation, DEPARTMENT OF CORRECTIONS OF THE STATE OF MICHIGAN, ELEANOR HUTZEL, JAMES E. WADSWORTH, ERNEST C. BROOKS, MAX BIBER, C. J. FARLEY, JOHN W. RICE, DUANE L. WATERS, FLORENCE CRANE, JOSEPH J. GROSS, G. ROBERT COTTON and GUS HARRISON,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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vs.

PARKE DAVIS & Co., a Michigan Corporation, THE UPJOHN Co., a Delaware Corporation, DEPARTMENT OF CORRECTIONS OF THE STATE OF MICHIGAN, ELEANOR HUTZEL, JAMES E. WADSWORTH, ERNEST C. BROOKS, MAX BIBER, C. J. FARLEY, JOHN W. RICE, DUANE L. WATERS, FLORENCE CRANE, JOSEPH J. GROSS, G. ROBERT COTTON and GUS HARRISON.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the 6th Circuit entered in the above-entitled cause on October 26, 1971.

OPINION BELOW

The opinions of the Court of Appeals for the 6th Circuit and the United States District Court for the Eastern District of Michigan, Southern Division, are not yet reported. The opinions of those Courts are appended hereto as Appendices A and B, respectively.

JURISDICTION

The judgment of the Court of Appeals for the 6th Circuit was entered on October 26, 1971. This Court's jurisdiction to review that judgment is conferred by Title 28, *United States Code*, Section 1254(1).

QUESTIONS PRESENTED

The questions presented by this Petition for Certiorari are:

I.

Can prison inmates who are required by a state to work for a profit-making corporation be "employees" of that corporation within the meaning of the Fair Labor Standards Act?

II.

Can prison inmates who are required by the State of Michigan to work for a profit-making corporation be "employees" of that corporation within the meaning of the Michigan minimum wage law?

III.

Are prison inmates illegally required by the State of Michigan to work for a profit-making corporation, entitled to receive the reasonable value of their labor from that corporation?

IV.

Does the use of prison inmates' labor in violation of State law violate the rights of such inmates to equal protection and due process of law under the Fourteenth Amendment?

V.

Does evidence of the existence of fifty-seven members of a class, where knowledge of the exact number of members is in possession of the Defendants, establish with sufficient definiteness the size of the class to satisfy Federal Rule of Civil Procedure 23(a)(1)?

FEDERAL AND STATE CONSTITUTIONAL AND STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

The pertinent text of the Federal and State Constitutional and Statutory provisions and rules involved is set forth in Appendix C attached hereto. The citations to said provisions are as follows:

United States Constitution
Fourteenth Amendment

United States Code
Title 29, Sections 203(d), (e), (g)

Federal Rules of Civil Procedure
Rule 23(a) (1)

Michigan Compiled Laws Annotated
Vol. 19, Sections 408.382, 408.394 (pp 108, 144)
Vol. 41, Sections 800.305, 800.310 (pp 553, 559)

STATEMENT OF THE CASE

Plaintiffs are or have been inmates at the State Prison of Southern Michigan at Jackson, Michigan. Defendants,

The Upjohn Company and Parke Davis & Company, are corporations organized for profit engaged generally in the drug manufacturing industry in interstate commerce.

Defendant Michigan Department of Corrections is a corporate body created by Michigan law and has exclusive jurisdiction over the administration of all penal institutions; and specifically over the management and control of prison labor and industry. The individual Defendants in this case are present or past members of the Michigan Corrections Commission, except for Gus Harrison who has been the Director of the Commission.

Both Defendant drug companies have been carrying on drug research at Jackson for some years, using volunteers from among the prisoners as guinea pigs to engage in drug testing and in finishing and refining products which are ultimately sold in interstate commerce. The research clinics involved in this case are utilized for the private profit-making purposes of Defendants Upjohn and Parke Davis and their shareholders. Present drug testing programs are administered or have been administered in great part by inmate labor furnished by the Department of Corrections pursuant to agreements with the drug companies executed in 1963. (Attached hereto as Appendices D and E).

These agreements generally require the drug companies to retain an architect and to pay the entire expense of planning and constructing clinical research buildings at the prison. The building is to be equipped completely by them, and as soon as the completed project is accepted by the Department of Corrections all of the building and fixed equipment is to become the property of the State of Michigan. The drug companies are given the right to use the building for clinical research only as long as that sort of research is conducted at the prison. The agreements further make the drug companies responsible for the conduct of clinical research in the building. The Department of Corrections agrees to take "all reasonable steps" to facilitate the conduct of clinical research by the drug companies. The agreements have been carried out in accordance with their terms and it is during the period subsequent to their execution that the acts complained of by Plaintiffs occurred.

All of the Plaintiffs who worked in the drug testing clinics organized and run by Defendant drug companies worked as part of the administrative or drug testing staff and not as so called voluntary guinea pigs. These prisoners did so because they were ordered to do so by the representatives of the Department of Corrections just as they would be ordered to work in any other prison industry.

Many different job classifications have existed at the drug clinic facilities and they are listed as follows with the rate of pay per day opposite each.

THE UPJOHN COMPANY

Job Classification	Duties	Rate of Pay
Chief Technician	Ordinarily performs specific tasks such as operation of EEG machine	$.76 – $1.25
Technician	Same as Chief Technician	$.50 – $ .75
Technician Trainee	Same as Chief Technician	$.35 – $ .50
Chief Clerk	Clerical tasks	$.75 – $1.25
Clerk	Clerical tasks	$.40 – $ .75
Nurse Supervisor	Acts as nurse in connection with clinical tests	$.50 – $1.00
Nurse	Same as Nurse Supervisor	$.30 – $ .50
Chief Cook	Cooks and serves food	$.55 – $ .80
Cook	Same as Chief Cook	
Kitchen	Assists in kitchen	$.40 – $ .55
Kitchen Pot & Pan	Assists in kitchen	$.25 – $ .40
Maintenance Man	Maintenance and minor repairs	$.35 – $ .60
Head Porter	Janitorial tasks	$.40 – $ .60
Porter	Janitorial tasks	$.25 – $ .40

PARKE DAVIS & COMPANY

Job Classification	Duties	Rate of Pay
Chief Clerk	Preparation of labels for blood, urine, etc., sample containers; prison details; call slips; inmate workers and volunteer payrolls	$1.25
Clerk	Double check labels	$ .75
Chief Cook	Cooking and other kitchen duties	$ .80
Head Porter	Janitor and messenger	$ .60
Maintenance Man	Maintenance and minor repairs	$ .60
Porter and Nurse Supervisor	Night janitor and attendant	$1.00

The inmates' wages are paid by check by each of the drug companies to the State of Michigan and then the amounts due to each prisoner are assigned to the prisoner's account by the Department of Corrections. Plaintiffs worked long hours in this program and had tasks involving substantial responsibility. Other than the nominal payment noted above, Plaintiffs received no compensation for the services rendered by them.

Plaintiffs brought this suit as a class action, seeking recovery for their labor and the labor of other inmates utilized by Defendants in the drug clinics located at the prison. The complaint filed on April 23, 1968, and the amended complaint (Appendix F) filed on January 21, 1970, seek recovery under four theories. Jurisdiction in the Federal District Court was based on Counts I and IV. The first count alleges Plaintiffs are entitled to protection under the Fair Labor Standards Act (29 *U.S.C.A.*, Sec. 201-219) and Count II alleges similar protection under

the Minimum Wage Law of the State of Michigan.[1] Count III seeks recovery on a quantum meruit theory, while Count IV seeks damages based on violations of Plaintiffs' rights under the Fourteenth Amendment.

The gravamen of the action under Counts I and II is that Plaintiffs were actually employees of the drug companies in economic reality, despite the fact of custodial control by the Michigan Department of Corrections. The core of Counts III and IV is the alleged illegal (under Michigan law) utilization of Plaintiffs' labor and the resultant deprivation of their property.

The pleadings allege a conspiracy on the part of the drug companies and the members of the Michigan Department of Corrections to illegally utilize Plaintiffs' labor without proper payment therefor.

After answers were filed by all Defendants and interrogatories by Plainliffs had been answered, Plaintiffs moved for summary judgment as to liability only under Count III and Defendant drug companies moved for summary judgment under Counts I, III and IV. They also moved to dismiss Count II. Defendant Department of Corrections and its individual members moved to dismiss Plaintiffs' amended complaint in its entirety. Defendant drug companies also moved the Court for an order that Plaintiffs' action could not be maintained as a class action.

The District Court granted Defendants' motion regarding the class action, finding that Plaintiffs had not sufficiently established the size of the class. The Court, further, treating the motions to dismiss as motions for summary judgment granted summary judgment to Defendants on all counts by order filed February 2, 1971.[2]

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[1] Vol. 19, *M.C.L.A.* Sec. 408.382 et seq (Appendix C)

[2] The Court expressly refused to consider and struck the affidavit of Plaintiff, Gaylord L. Espich, which conflicted factually with Defendants' affidavits, but which the Court held did not comply with Rule 56(e).

REASONS FOR GRANTING THE WRIT

This case presents novel issues the resolution of which will have significant impact throughout the country. It is particularly relevant today when the treatment of inmates of our penal institutions is a subject of national concern; and when the failure to adequately deal with that problem has been the cause of many prison rebellions and uprisings. In the light of Attica and other comparable occurrences, the rights of prisoners with regard to their employment has nation wide significance. In addition, the arrangement present between the Michigan Department of Corrections and Parke Davis and Upjohn has counterparts elsewhere in the United States, so that the decision herein will have wide application.

Moreover, an interpretation of an important section of an important federal law is involved. The definitions in the Fair Labor Standards Act of "Employer", "Employee" and "Employment", are extremely broad and their interpretation is dependent on judicial decision.

The relevant terms used in the Act are the following:

> " 'Employee': any individual employed by an employer (29 U.S.C. Sec. 203(e))
>
> 'Employer': any person acting directly or indirectly in the interest of an employer in relation to an employee (29 U.S.C. Sec. 203(d))
>
> 'Employ': to suffer or permit to work (29 U.S.C. Sec. 203(g))"

Because of the breadth of the above language and the fact that its literal application would "encompass all employed humanity" (*Walling v. Sanders*, 136 F2d 78, 80; 6th Cir. 1943), the Courts have applied the narrower test of "economic reality" to determine the status of one as an employee or non-employee. (*Goldberg v. Whitaker House Cooperative, Inc.*, 366 US 28, 33 (1960). The economic reality in this case is that Defendant drug companies are obtaining and have obtained hundreds of thousands of

dollars worth of free labor by use of the device involved in this case. The drug companies bear the expense of the wages of the prisoners and they direct them in their everyday work. If the clinics were located across the street from the prison and employed prisoners on "work release" programs, it seems clear they would be entitled to minimum wages. Whether or not the Fair Labor Standards Act applies or could apply to prison inmates is a matter of substantial importance which should be decided by this Court.

A further important question is presented under Count IV of Plaintiffs' Amended Complaint with regard to alleged violation of their constitutional rights under the Fourteenth Amendment. For purposes of the Motion for Summary Judgement by which the trial court decided its case, all the allegations contained in Plaintiffs' Amended Complaint were taken as true. This includes the allegation that the arrangement between the drug companies and the Michigan Department of Corrections for the utilization of prison labor *violated express Michigan statutory law.*[3]

The fundamental right of a person, even while incarcerated, to the fruits of his labor unless legally taken from him, is a question of great relevance given the circumstances of todays society.

It has been suggested that a prisoner's "vested" interest in his pay is a constitutionally protected interest. (*Sigler v. Lowrie*, 404 F2d 659 (8th Cir., 1968)).

The cooperation and conspiracy between the Department of Corrections and the drug companies to evade the law of Michigan and the claimed federal Constitutional rights of the prisoners is a matter which should be put at rest by a decision of this Court. Too prevalent today is the fact of the "establishment" saying one thing to people and doing another itself. It seems particularly ironic and improper for persons incarcerated for failure to obey the law to be treated at variance with the law by their very captors and judges. The impact of this is magnified by the fact that economics in terms of gain to the drug

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[3] See the text of *M.C.L.A.* Sections 800.305 and 800.310 contained in Appendix C.

companies seems to be a primary factor in inducing the situation.

The Court should review this case in order to define more clearly the rights of persons incarcerated for crime and to define more clearly the coverage of the Fair Labor Standards Act.

CONCLUSION

Petitioners believe that this case involves a timely and substantial question of great public importance; and further, that the decisions of the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Eastern District of Michigan, Southern Division, should be reversed for the reasons already stated herein.

Respectfully submitted,

Leitson, Dean; Dean, Segar & Hart, P.C.
Attorneys for Petitioners

By: .....
Robert L. Segar

APPENDIX A — OPINION AND ORDER IN COURT OF APPEALS

No. 71-1170

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CALVIN SIMS, RICHARD ALLEN, FRANK ROGERS, BILLY LEE WILLIAMS, WALTER LEE, BOYD SLAGER, PETER GEORGE MILLS, LEE D. WALKER, CLEMONT DEDEAUX, ORDELL VILBURN, WILLIAM CLEARY, HERBERT WILLIAMS, FRED HOLNAGEL, BENNY SPELLS, KENNETH INMAN, RAYMOND L. BAILEY, ORCEAN DAVIS, JERRY MACK, BOYD KELTON, THOMAS H. LORD, RALPH WATSON, CHESTER A. SAWICKI, PHILLIP McGHEE, VERNON D. MEVIS, RALPH R. WARNER, RONALD D. KENNEDY, PAUL ROSS, HERMAN HEAD, GERALD G. NORMAN, PAUL MILLER, THOMAS U. MULLIGAN, LONNIE PAYNE, ROBERT MASON, GAYLORD L. ESPICH and KENNETH R. MARSHALL,

Plaintiffs-Appellants,

vs.

PARKE DAVIS & Co., a Michigan Corporation, THE UPJOHN Co., a Delaware Corporation, DEPARTMENT OF CORRECTIONS OF THE STATE OF MICHIGAN, ELEANOR HUTZEL, JAMES E. WADSWORTH, ERNEST C. BROOKS, MAX BIBER, C. J. FARLEY, JOHN W. RICE, DUANE L. WATERS, FLORENCE CRANE, JOSEPH J. GROSS, G. ROBERT COTTON and GUS HARRISON,

Defendants-Appellees.

PER CURIAM ORDER

Before: McCREE, BROOKS and KENT, Circuit Judges

This action was brought as a class action in the District Court for the Eastern District of Michigan, Southern Division. The plaintiffs-appellants are present and former

inmates at the State Prison of Southern Michigan seeking additional recovery for their labor in drug clinics operated on the prison grounds by two of the defendants-appellees, Parke Davis & Company and The Upjohn Company. Plaintiffs' claims are based primarily on their contentions that (1) they are entitled to recover from the defendant drug companies the difference between the compensation they received for their work and the minimum wage prescribed by the Fair Labor Standards Act, 29 U.S.C. § 201, et seq; (2) or otherwise, they are entitled to recover the difference between the compensation received and the minimum wage as prescribed by the Michigan Minimum Wage Law of 1964, Mich. Com. Laws § 408.381. Also, they claim the drug companies have been unjustly enriched by the illegal use of their services for which the plaintiffs should recover on a quantum meruit basis, and further, that they are entitled to damages for various alleged constitutional deprivations.

The District Court, in a detailed and comprehensive opinion, refused to permit the action to be maintained as a class action and granted summary judgment denying all relief sought by the plaintiffs. Upon our consideration of the record, the briefs and oral arguments of the parties, it is concluded that the judgment of the District Court should be affirmed for the reasons stated by Chief Judge Ralph M. Freeman in his opinion reported in ..... F. Supp. ..... (1971).

It is so ORDERED.

Entered by order of the Court

(s) James A. Higgins
Clerk

APPENDIX B — OPINION AND ORDER OF DISTRICT COURT

(Filed January 5, 1971)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CALVIN SIMS, RICHARD ALLEN, FRANK ROGERS, BILLY LEE WILLIAMS, WALTER LEE, BOYD SLAGER, PETER GEORGE MILLS, LEE D. WALKER, CLEMONT DEDEAUX, ORDELL VILBURN, WILLIAM CLEARY, HERBERT WILLIAMS, FRED HOLNAGEL, BENNY SPELLS, KENNETH INMAN, RAYMOND L. BAILEY, ORCEAN DAVIS, JERRY MACK, BOYD KELTON, THOMAS H. LORD, RALPH WATSON, CHESTER A. SAWICKI, PHILLIP McGHEE, VERNON D. MEVIS, RALPH R. WARNER, RONALD D. KENNEDY, PAUL ROSS, HERMAN HEAD, GERALD G. NORMAN, PAUL MILLER, THOMAS U. MULLIGAN, LONNIE PAYNE, ROBERT MASON and KENNETH R. MARSHALL,

Plaintiffs.

Civil Action No. 31172

vs.

PARKE DAVIS & CO., a Michigan Corporation, THE UPJOHN CO., a Delaware Corporation, DEPARTMENT OF CORRECTIONS OF THE STATE OF MICHIGAN, ELEANOR HUTZEL, JAMES E. WADSWORTH, ERNEST C. BROOKS, MAX BIBER, C. J. FARLEY, JOHN W. RICE, DUANE L. WATERS, FLORENCE CRANE, JOSEPH J. GROSS, G. ROBERT COTTON and GUS HARRISON,

Defendants.

MEMORANDUM OPINION

Plaintiffs were convicted of crimes under the laws of Michigan and are serving, or have served, terms in the State Prison of Southern Michigan, at Jackson, Michigan, (hereafter referred to as Jackson Prison). Two of the de-

fendants, Parke Davis & Company and The Upjohn Company, are private corporations engaged in the interstate manufacture of drugs. A third defendant, the Department of Corrections of the State of Michigan, has "exclusive jurisdiction over . . .: (c) penal institutions . . . prison labor and industry . . ." Mich. Com. Laws §791.204. The defendants Eleanor Hutzel, James E. Wadsworth, Ernest C. Brooks, Max Biber, C. J. Farley, John W. Rice, Duane L. Waters, Florence Crane, Joseph J. Gross and G. Robert Cotton are, or were, members of the Michigan Corrections Commission which supervises the Department of Corrections. Mich. Com. Laws §§ 791.201-791.203. The defendant Gus Harrison is Director of the Department of Corrections. Jurisdiction is based upon Title 29 U.S.C. § 216 (6); Title 28 U.S.C. §§ 1337, 1343; and Title 42 § 1983.

The background facts giving rise to the present complaint are not in dispute. In November of 1963 the Michigan Department of Corrections entered into two separate agreements with defendant Upjohn Company, and defendant Parke Davis & Company. Pursuant to those agreements, each drug company was permitted to construct, at its own expense, ". . . a Clinical Research Building at the State Prison of Southern Michigan." Both buildings were subsequently completed and, under the terms of the contracts, became "the property of the State of Michigan," with the defendant drug companies retaining the right to use the buildings they constructed "for clinical research so long as clinical research is conducted by any organization or corporation at the State Prison of Southern Michigan."

The "clinical research" presently carried on in those buildings involves the testing of drugs on volunteers among the Jackson inmates. The plaintiffs, however, and the class plaintiffs seek to represent, were not used as subjects in drug experiments; instead, they performed various services in connection with the operation of the clinics. Those services were grouped together under the following job classifications:

Parke Davis & Company

Classification:	Services Performed:
Chief Clerk	Preparation of prison details
Clerk	Double check labels
Chief Cook	Cooking and other kitchen duties
Head Porter	Janitor and Messenger
Maintenance Man	Maintenance and minor repairs
Porter and Nurse Supervisor	Night Janitor and Attendant

The Upjohn Company

Classification:	Services Performed:
Chief Technician	Performs specific tasks such as operation of EEG machine
Technician	Same as above
Technician Trainee	Same as above
Chief Clerk	Clerical tasks
Clerk	Clerical tasks
Nurse Supervisor	Acts as nurse in connection with clinical tests
Nurse	Same as above
Chief Cook	Cooks and serves food
Cook	Same as above
Kitchen	Assists in kitchen
Kitchen Pot and Pan	Assists in kitchen
Maintenance Man	Maintenance and minor repairs
Head Porter	Janitorial tasks
Porter	Janitorial tasks

Plaintiffs allege that they, as well as other Jackson inmates, were forced by "defendants Parke Davis & Company and The Upjohn Company in conjunction with representatives of the Michigan Department of Corrections" to work in those classifications "on a regular basis up to as much as one hundred twelve (112) hours per week" at wages ranging "from Thirty-Five ($0.35) to One Dollar and 25 100 ($1.25) per day."

On the basis of these allegations, plaintiffs conclude in Count I of their amended complaint that they are entitled to recover from the defendant drug companies the difference between the compensation received for their labor and the minimum wage prescribed by the Fair Labor Standards Act of 1938 (FLSA), as amended, 29 U.S.C. § 201 *et seq.* In Count II of their amended complaint, plaintiffs contend that if the Fair Labor Standards Act is found to be inapplicable, then plaintiffs are entitled to recover from the defendant drug companies the difference between the compensation they received for their labor and the minimum wage as prescribed by the Michigan Minimum Wage Law of 1964, Mich. Com. Laws § 408.381. Count III of the amended complaint alleges that the utilization of the plaintiffs' labor by the drug companies is illegal under Section 800.305 Mich. Com. Laws and "has resulted in . . . the unjust enrichment of Defendants [drug companies] in the amount by which the reasonable value of Plaintiffs' services exceeds the amount paid by Defendants to Plaintiffs." Plaintiffs also contend in Count III that the "Defendants other than Parke Davis & Company and The Upjohn Company have been unjustly enriched . . . from the illegal use of Plaintiffs' labor by the acquisition for the State Prison of Southern Michigan of a building (i.e., the structure housing the clinic.)".

In Count IV, plaintiffs allege that "the illegal utilization . . . of Plaintiffs' labor by all Defendants and the payment by Defendants Parke Davis & Company and The Upjohn Company of nominal wages less than those required by law" has resulted and is resulting in: (1) deprivation of the property of plaintiffs without due process of law; (2) the holding of plaintiffs in involuntary servitude contrary to the Thirteenth Amendment to the Federal

Constitution; and (3) the denial to plaintiffs of equal protection of laws as guaranteed by the Fourteenth Amendment. For these alleged violations of their Constitutional rights, plaintiffs seek one million dollars in damages from defendants.

Plaintiffs have now filed a motion for summary judgment on Count III. The defendants Upjohn Company and Parke Davis Company have, in turn, filed motions for summary judgment on Counts I, III, IV; a motion to dismiss Count II as failing to state a claim upon which relief can be granted; and a motion for an order that plaintiffs' action cannot be maintained as a class action. Defendant Department of Corrections, its Director, and the members of the Corrections Commission have also filed a motion to dismiss the complaint as to them. All of these motions are now before the court.

PARKE-DAVIS AND UPJOHN'S MOTION FOR AN ORDER THAT PLAINTIFFS' SUIT CANNOT BE MAINTAINED AS A CLASS ACTION

In their complaint, plaintiffs state:

> "There are numerous other people who either are or have been inmates in the State Prison of Southern Michigan at Jackson, Michigan, who have the same cause of action as hereinafter set forth on the part of the named Plaintiffs, and the named Plaintiffs adequately represent such unnamed people. This action is brought pursuant to Rule 23 A of the Federal Rules of Civil Procedure on behalf of all such people whose number make it impractical to have them join as Plaintiffs. The named Plaintiffs adequately represent said class."

Defendant Upjohn Company, however, has filed a motion for an order declaring that the present case cannot be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure.

Rule 23 requires a plaintiff who wishes to bring a class action to overcome two hurdles. First, he must satisfy all the conditions of Rule 23 (a), which are:

> "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

After satisfying the court that all the conditions of Rule 23 (a) have been met, the litigant must establish that his action is appropriate under one of the three subdivisions of Rule 23 (b). Rule 23 (b) provides that:

> "(b) . . . An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any question affecting only individual members, and

that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Once a plaintiff has demonstrated that his suit comes within the requirements of Rule 23, he can then pursue the action not only on his own behalf, but also on behalf of all other persons similarly situated, although those persons are not parties to the litigation.

Claims for minimum wages under the Fair Labor Standards Act, however, cannot be maintained as a class action under Rule 23. That is because 29 U.S.C. § 216 (b) limits the binding effects of a judgment adjudicating rights under the FLSA to persons who have filed a written consent to become parties to the suit:

"Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. *No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. . . .*" (Emphasis added.) 29 U.S.C. § 216(b)

Hence, plaintiffs concede that since Count I of their complaint alleges a claim under the FLSA, it cannot be maintained under Rule 23, and those inmates not filing written consents can neither benefit from nor be bound by any judgment rendered on Count I.

Nevertheless, plaintiffs contend that Counts II, III and IV of their complaint are maintainable as a Rule 23 class action. Yet assuming Rule 23, rather than 29 U.S.C. § 216(b), is applicable to the remaining Counts, as plaintiffs argue, the requirements of that rule have not been met.

The first prerequisite to a Rule 23 action is a class ". . . so numerous that joinder of all members is impracticable . . . ." 23(a) (1). The resolution of what constitutes "impracticability" depends ". . . upon all the circumstances surrounding a case. . . . Courts should not be so rigid as to depend upon mere numbers as a guideline to the practicability of joinder." *Demarco v. Edens*, 390 F.2d 836, 845 (2nd Cir. 1968).

On the other hand, while the number of prospective class members is not determinative of the impracticability of joinder: ". . . it is a significant factor to be considered." *Fidelis Corp. v. Litton Industries, Inc.*, 293 F. Supp. 164, 170 (S.D.N.Y. 1968); *accord, Philadelphia Electric Co. v. Anaconda American Brass Company*, 43 F.R.D. 452 (E.D. Pa. 1968). But that factor cannot be examined in the present case, for plaintiffs have failed to even allege the approximate size of the class they seek to represent. Instead, their pleadings merely contain the conclusionary statement that "there are numerous other people who . . . have the same cause of action . . ." and ". . . whose number make it impracticable to have them join as plaintiffs." The only information this court has been given on class size was supplied by plaintiffs' attorney during oral argument, when he commented that the class would probably contain between 70 and 200 persons. Since this estimate was unsupported by any materials before the court, it must be deemed purely speculative, and speculation cannot be used to establish that a prospective class is so numerous as to make joinder impracticable under the surrounding circumstances. *Demarco v. Edens, supra*, at 845; *Matthies v. Seymour Mfg. Co.*, 23 F.R.D. 64, 75 (D.Conn. 1958), *rev. on*

other grounds, 270 F.2d 365 (2nd Cir. 1959); See, *Lucas v. Seagrave Corp.*, 277 F.Supp. 338, 348 (D.Minn. 1967).

Because more than speculation as to class size is required for a court to determine if the requirement of 23(a) (1) is met does not mean, however, that plaintiffs have to establish class size with precision. It simply means that some information must be presented by plaintiffs from which the approximate number of class members can be ascertained before the court can decide if joinder of all those members would be impracticable.

Since plaintiffs have failed to show that the requirement of 23(a) (1) has been satisfied, Counts II, III, and IV are not maintainable as a class action. Thus, defendants' motion for an order declaring those Counts cannot be pursued as a class action is granted, subject to possible revision if plaintiffs later demonstrate that their suit complies with Rule 23(a) (1). Defendants' motion for a similar order that Count I cannot proceed as a Rule 23 class action is also granted for the reasons previously stated.

MOTION FOR SUMMARY JUDGMENT ON COUNT I FILED BY DEFENDANT DRUG COMPANIES

In Count I of their amended complaint, plaintiffs allege that they are entitled to recover from defendant drug companies the difference between the amounts plaintiffs received for their labor in the research clinics and the minimum wage plus overtime compensation, prescribed by the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §201 *et seq.* Defendant drug companies have moved for summary judgment on this Count pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, which provides:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Plaintiffs maintain that there are genuine issues of material fact to be decided in Count I, and, thus, under Rule 56(c), defendants' motion for summary judgment must be denied. Defendants, on the other hand, contend that the affidavits they have filed, as well as their answers to interrogatories, are uncontroverted by sworn testimony submitted by plaintiffs and must, therefore, be viewed as presenting undisputed facts. It is defendants' position that on those facts the applicable law entitles them to judgment.

Although the parties disagree on the factual posture of Count I, they are in accord that the only question of law raised by this Count is whether plaintiffs are "employees" of either defendant within the meaning of the Fair Labor Standards Act. That Act, as amended, defines "employee" as:

> ". . . any individual employed by an employer, except that such term shall not, for the purposes of subsection (u) of this section include —
>
> (1) any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family, or
>
> (2) any individual who is employed by an employer engaged in agriculture if such individual (A) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (B) commutes daily from his permanent residence to the farm on which he is so employed, and (C) has been employed in agriculture less than thirteen weeks during the preceding calendar year." 29 U.S.C. § 203(e).

An employer is defined as:

> ". . . any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State

> or political subdivision of a State (except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence), or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." 29 U.S.C. § 203(d).

To employ, in turn, means ". . . to suffer or permit to work." 29 U.S.C. § 203(g).

A literal application of those definitions contained in the Act would, as the parties note, "encompass all employed humanity." *Walling v. Sanders*, 136 F.2d 78, 80 (6th Cir. 1943). For this reason, courts have been forced to devise a more meaningful test to determine when an employment relationship exists within the meaning of the FLSA. That test is one of "economic reality," [*Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1960)] and is not limited to the technical concepts ". . . pertinent to an employer's legal responsibility to third persons for acts of his servants." *United States v. Silk*, 331 U.S. 704, 713 (1946).

Plaintiffs do not contest the applicability of the economic reality test to Count I of their complaint, but instead allege that this test involves considerations of a peculiarly factual nature which preclude summary judgment treatment. Plaintiffs, however, have failed to cite any legal authority to support their contention that summary judgment is inappropriate in cases raising the question of whether an employment relationship exists under the FLSA. And while the United States Supreme Court in *Kennedy v. Silas Mason Company*, 334 U.S. 249 (1948), did vacate a summary judgment where that very issue was involved, the Court specifically noted that summary disposal would have been proper if the record had presented ". . . a more solid basis of findings . . . or a comprehensive statement of agreed facts." 334 U.S. at 257.

Subsequent to the *Kennedy* decision, the District Court for the Eastern District of Texas summarily adjudicated rights under the Fair Labor Standards Act, after finding the defendants were not independent contractors. The Fifth Circuit Court of Appeals affirmed on the ground that the uncontroverted facts before the lower court were sufficient to warrant its ultimate finding:

> "... that appellee was not an independent contractor. ... A reasonable inference fairly deduced from an uncontroverted ... number of facts may establish the existence of an ultimate fact that entitles one of the parties to judgment as a matter of law. When this happened, as it did in this case, and summary judgment is sought, Rule 56(c) requires that 'judgment ... shall be rendered forthwith.'" *Creel v. Lone Star Defense Corp.*, 171 F.2d 964, 968 (5th Cir. 1948), *rev'd on other grounds*, 339 U.S. 497 (1950).

Under *Kennedy*, *supra*, and the reasoning of the Fifth Circuit Court of Appeals, defendant drug companies would be entitled to summary judgment if the present record contains sufficient uncontroverted facts from which this court can conclude that in economic reality plaintiffs are not "employees" of defendants. On the other hand, if the sworn testimony on material facts is contradictory, or if the record does not contain a sufficiently comprehensive picture of plaintiffs' relationship to defendants, then defendants' motion for summary judgment must be denied.

In deciding whether the inmates working at the Jackson research clinics are, in economic reality, employees of defendants, both parties agree that the court must consider the extent to which defendants can hire, fire and control those inmates. *Walling v. Sanders*, *supra*. It is the position of defendants that they can exercise only limited control over the inmates and that they have no authority over hiring and firing. To support their contentions, defendants have filed the affidavit of George A. Kropp, Warden of the State Prison of Southern Michigan.

In his affidavit, Warden Kropp swears that the Director of Prison Treatment, acting with the prison Classification Committee, determines every work assignment of inmates, including assignments to the research clinics. The Director of Treatment and the Classification Committee, however, will consider requests from Parke-Davis and Upjohn for the assignment of certain inmates, although prison officials can place inmates at work in the clinics over the objections of the drug companies.

Moreover, according to Warden Kropp, the Director of Treatment is similarly responsible for the removal of inmates from their work assignments and has removed inmates from clinic assignments without the knowledge or approval of the drug companies. As in the case of assignments, the drug companies may request that the Director of Treatment remove particular inmates from the research clinics, but those requests can be denied. Finally, Warden Kropp maintains that his Deputy Warden has the power to disapprove the hours worked and the particular tasks performed by inmates on all work assignments and has exercised that power in the case of certain inmates assigned to the clinics.

The defendant Upjohn Company has also introduced the affidavit of Ralph F. Willy, Administrator of the Upjohn clinic at Jackson. Willy's affidavit is to the same effect as Warden Kropp's and states that: (1) inmates were in some instances assigned by the prison Classification Committee to perform specific tasks at the Upjohn clinic, although the clinic had no need for additional help; (2) inmates assigned to the Upjohn clinic took time off from their tasks pursuant to prison rules without the approval of their Upjohn supervisor; (3) specific instructions by Upjohn personnel to inmates were sometimes vetoed by prison authorities; and (4) requests by Upjohn filed with the Classification Committee to remove inmates from the clinic were in some instances denied.

The answers to interrogatories of both Upjohn and Parke-Davis, which may be examined in a summary judgment proceeding, further buttress the affidavits of Willy and Kropp. According to those answers, neither drug company was ever permitted to select an inmate for as-

signment to the research clinic (Interrogatory Answer No. 6); the prison authorities could require the companies to keep an inmate working in the clinic over drug company objections (Interrogatory Answer No. 16); and the hours worked by inmates assigned to the clinics were regulated by prison authorities (Interrogatory Answer No. 13).

Plaintiffs' attorney, however, contends that defendants' affidavits and interrogatory answers concerning clinic assignments and the direction of the clinic work force are controverted by sworn testimony submitted by plaintiffs. Thus, plaintiffs conclude that Count I must be tried since summary judgment proceedings cannot be used to resolve a conflict among affidavits. Yet, an examination of the materials filed by plaintiffs in opposition to the summary judgment motion fails to reveal such a conflict.

The affidavit of Gaylord Lee Espich, which plaintiffs allege contradicts Upjohn's sworn testimony that it did not select the inmates to work in the clinic, cannot be considered by the court. As Upjohn correctly notes, Rule 56 (e) requires affidavits "... be made on personal knowledge, ... and ... show affirmatively that the affiant is competent to testify to the matters stated therein." While affiant Espich states he is competent to testify from personal knowledge that "the Upjohn Company, personally approved all inmates who worked in the said clinic and persons could not work there that were not so approved," his competency and firsthand knowledge of these facts is unsupported by anything contained in his affidavit. Espich does not, "in his affidavit or otherwise reveal how he knew these facts. Inasmuch as summary judgment procedure lacks the safeguard of cross-examination of an affiant, it is important that it be shown that he is competent to testify to the matters therein stated." *American Security Co. v. Hamilton Glass Co.*, 254 F.2d 889, 893-894 (7th Cir. 1970); *Accord, Green v. Benson*, 271 F.Supp. 90 (E.D.Pa. 1967). Indeed, since Espich is simply one of the inmates who worked in the Upjohn laboratory, it is difficult to see how he could be competent to testify from firsthand knowledge on whether Upjohn "personally approved all inmates who worked" in its clinic. Hence, that portion of Espich's affidavit referring to Upjohn's selec-

tion of inmates will be stricken as failing to conform with Rule 56(e).

Plaintiffs' attorney has filed four other affidavits of Jackson inmates, Boyd Slager, Clemont M. DeDeaux, Chester A. Sawicki, and Calvin Sims, who worked in the research clinics and who are parties to the present suit. Portions of those affidavits support, rather than contradict, defendants' sworn testimony that prison authorities, not the drug companies, selected the inmates for work in the research clinics.

Affidavit of Boyd Slager:

"9. Affiant was placed in the Upjohn Clinic for purposes of work by the following method:

"In June of 1964, while working in the Main Hall Office of the State Prison of Southern Michigan as a Count Clerk on the Night Shift. Affiant was offered or made aware of an opening in the Upjohn Medical Research Clinic, located inside the Walls of the Prison, by the then Inmate Clerk, John Dutz. I then requested and was granted an interview with the Clinic Administrator, Mr. Ralph F. Willy. After that interview, a request was made to the Prison Classification Director Mr. Sefmeige (now retired), and in the fore part of July 1964 I was taken before the Classification Committee and it was decided that the Prison Officials had no objection to the transfer and it was approved, provided that I stayed on to help break another Inmate in on the Main Hall Office job. This was done and in August of 1964, an Assignment Change Order was signed by Mr. G. L. Hansen, Director of Treatment, indicating that I was to go to work at the Upjohn Clinic. On August 19, 1964, I started work at the clinic on a full time basis which continued until July 1967."

Affidavits of Clemont M. DeDeaux, Chester A. Sawicki, and Calvin Sims:

"6. He and others working at the clinics did so because they were ordered to do so by representatives

> of the Department of Corrections just as they would be ordered to work in any other prison industry and a refusal to work as directed would have resulted in penalties to them and such coercion and threat, was under the circumstances, clearly implied if not expressly stated."

The affidavits of Sims, DeDeaux, Sawicki, and Slager also say that the affiants "worked directly under the supervision of civilian employees of the drug companies." According to plaintiffs' attorney, those statements contradict defendants' sworn testimony concerning the drug companies' lack of control over inmates assigned to the clinics. Defendants, however, admit that their agents directly supervised the inmates in the day-to-day performance of clinic work (Defendants' Brief on Count I, p. 4), and the affidavits submitted by defendants do not claim to the contrary. Rather, those affidavits indicate that defendants' day-to-day supervision over inmates was always subject to the overriding authority of prison officials, who frequently exercised their authority to disapprove the drug companies' instructions to inmates. Hence, the fact that clinic inmates were supervised in the routine performance of their tasks by defendants is simply another uncontroverted fact for the court to consider in analyzing the extent to which defendants actually control the inmates working in the clinic.

Finally, plaintiffs' attorney maintains that a letter, cosigned by Upjohn and Parke-Davis officials and referring to the "hiring" of inmates at the research clinics contradicts defendants' sworn testimony on the drug companies' inability to select inmates for work in the clinics. [Exhibit G-1, letter signed by J. P. Conlin of Parke-Davis and R. Willy of Upjohn]. We cannot agree with plaintiffs on this point. To show there is a material fact in dispute on the present summary judgment motion, plaintiffs must produce a factual description of the procedures by which defendants acquire inmate help, and such description must be different from the one presented by defendants' affiants. The word "hiring" is not a factual description, but simply a shorthand notation that is often used by businessmen

to connote any variety of procedures resulting in the attainment of a work force.

Moreover, the letter containing the reference to hiring is only one in an exhibit of many letters signed by drug company personnel or by prison officials, which plaintiffs have submitted for our examination. [Defendants have stipulated to the court's consideration of that entire exhibit for the purposes of the present motion.] The content of those letters, when read together, indicate that even though defendants' personnel might occasionally refer to the hiring of inmates, the assignment of inmates to the clinics was determined by prison authorities. [See, e.g., Exhibits G-4 and A-5].

Having carefully reviewed all the admissible affidavits, documents, and interrogatories submitted by both parties, this court concludes that the following facts have been established by uncontroverted sworn testimony: (1) prison officials, not the drug companies, decide which inmates will work in the clinics, and inmates have been assigned to the clinics despite the disapproval of the drug companies; (2) prison authorities, not the drug companies, determine when inmates will be removed from their assignment to the clinics, and inmates have been so removed without the approval of the drug companies; (3) the particular tasks performed by inmates working in the clinics must be approved by prison officials; (4) the hours worked by inmates are subject to the approval of prison officials; (5) inmates working in the clinics may be given time off from their tasks by prison officials without the consent or knowledge of defendant drug companies; (6) the inmates are supervised by defendant drug companies in the day-to-day performance of their work at the clinics. From these uncontroverted facts, the court must conclude that neither Upjohn nor Parke-Davis had the right to hire or fire inmates, and that the companies' supervision of inmates' work performance was always subject to final control by prison officials.

But the fact that defendants could not hire, fire or finally control inmates working in the clinics is not determinative on the issue of whether plaintiffs are employees of the drug companies under the economic reality test. The entire

fabric of plaintiffs' relationship to the companies must be considered.

A comprehensive picture of that relationship, excluding the elements already discussed, is presented by defendants' answers to interrogatories, portions of Warden Kropp's affidavit, and the parties' judicial admissions. They establish that plaintiffs are, or were, lawfully convicted criminals, serving sentences in Jackson prison. As prisoners, plaintiffs were ordered by prison authorities to perform services for defendant drug companies, just as they would be ordered to work in any other prison industry. Those services, which have previously been described, were performed inside the prison walls in a clinic operated by the drug companies and owned by the State of Michigan. Plaintiffs were paid for their services to the drug companies by the Department of Corrections at per diem rates established by the Department. The drug companies, in turn, reimbursed the Department for its payments to inmates working at the clinics. The drug companies never contracted with the inmates for the payment of compensation.

A case involving an almost identical relationship between prisoners and a private corporation was decided under the Fair Labor Standards Act by the Federal District Court for the Western District of Michigan in 1948. That case, *Huntley v. Gunn Furniture Company*, 79 F.Supp. 110 (W.D.Mich. 1948), also had certain inmates of Jackson Prison as plaintiffs claiming to be entitled to the Federal Minimum Wage.

In *Huntley*, plaintiffs alleged that the Michigan Corrections Commission entered into a contract with defendant, a private manufacturing corporation, whereby the State of Michigan would supply defendant with a convict labor force to work on the assembly of shell casings. Pursuant to that contract, plaintiffs were allegedly assigned to work in the prison stamping plant upon those shell casings. According to the complaint, plaintiffs' work was supervised by prison employees, who were paid by the defendant and who were under the defendant's direction. Plaintiffs further alleged that defendant reimbursed the State of Mich-

igan for the inmates' per diem compensation, which was paid by the State of Michigan.

On the basis of the above allegations, Judge Starr dismissed the prisoners' complaint, saying:

> "... the complaint in the present case fails to allege facts showing that plaintiffs were employees of the defendant within the meaning of the words 'employ' and 'employee' as used in the Act [Fair Labor Standards Act]. In fact, the complaint affirmatively shows that the plaintiffs were employees of the Michigan prison industries and not of the defendant. In view of this conclusion, it is unnecessary to determine the question of the validity of the contract between the defendant and the prison industries." 79 F.Supp. at 116.

Plaintiffs, however, would distinguish the *Huntley* case from the present suit because here the defendant drug companies exercised a degree of supervision over inmates assigned to the clinics, while in *Huntley*, only prison employees directed the convict work force. To distinguish the cases on this ground would ignore the allegation in *Huntley* that the prison employees who supervised the inmates in their work in the stamping plant were "under the supervision and direction of the defendant." 79 F. Supp. at 112. Since those allegations had to be accepted as true for the purposes of the motion to dismiss, the *Huntley* court was required to assume that the defendants' agents supervised plaintiffs in their routine work at the stamping plant. That assumption corresponds to the uncontroverted facts now before the court.

In our opinion, Judge Starr's decision that the prisoners there were not employees of the defendant manufacturing corporation within the meaning of the FLSA was correct. Similarly, in our case, we believe that the economic reality of the present situation, based on uncontroverted facts, requires a finding that the present plaintiffs are not employees of the defendant drug companies.

The economic reality is that plaintiffs are convicted criminals incarcerated in a state penitentiary. As state prisoners, they have been assigned by prison officials to

work on the penitentiary premises for private corporations at rates established and paid by the State. In return for the use of this convict labor, the private corporations have relinquished their normal rights: (1) to determine when, and whether, their enterprises need additional help; (2) to select the members of their work force; (3) to remove from their work force members with whom they are dissatisfied; (4) to control that labor force except in the most routine matters. To find on those facts that an employment relationship exists between the prisoners and private corporations is contrary to the economic reality of their relationship.

Moreover, we do not think that Congress intended the Fair Labor Standards Act to cover the present situation. The setting of wages for incarcerated prisoners working on assignment by prison officials requires the consideration of many variables which are unique to that situation and which directly affect government policy on rehabilitation of criminals. It is unlikely that Congress considered any of those variables at the time it adopted general legislation designed to give employees the right to a subsistence wage. Fair Labor Standards Act, 81 Cong. Rec. 7652, 7672, 7885; 82 Cong. Rec. 1386, 1395, 1491, 1505, 1507; 83 Cong. Rec. 7283, 7298, 9260, 9265. See also H. Rep. No. 1452, 75th Cong. 1st Sess., p. 9; S. Rep. No. 884, 75th Cong., 1st Sess., pp. 3-4. Congress has, however, recognized the possibility of convict labor being used to compete with the free labor market and made it a crime to:

> "(a) . . . knowingly transport in interstate commerce . . . any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution. . . .
>
> "(b) This chapter shall not apply to . . . commodities manufactured in a Federal, District of Columbia, or State institution for use by the Federal Government, or by the District of Columbia, or by any State or Political subdivision of a State." 18 U.S.C. § 1761.

Nevertheless, the court does not now hold that any prisoner who is assigned by prison officials to perform work for a private corporation on the penitentiary premises is, because of his prisoner status, outside the coverage of the Fair Labor Standards Act. We only find that on the present facts plaintiffs are not in economic reality employees of defendant drug companies as that word is defined in the Act. Hence, defendants' motion for summary judgment on Count I is granted.

DEFENDANT DRUG COMPANIES' MOTION TO DISMISS COUNT II

In Count II, plaintiffs set forth a claim under the Michigan Minimum Wage Law of 1964, Mich. Com. Laws, § 408.381. That claim involves allegations identical to those contained in Count I of the complaint and is before the court under its pendent jurisdiction: *Siler v. Louisville and Nashville R. Co.*, 213 U.S. 175 (1909); *Hurn v. Oursler*, 289 U.S. 238 (1933); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Defendants Upjohn and Parke-Davis have filed a motion to dismiss Count II for failing to state a claim upon which relief can be granted under the Michigan Minimum Wage Law. The Michigan Minimum Wage Law, Section 14, provides:

> "The provisions of this act shall not apply to any employer who is subject to the minimum wage provisions of the federal fair labor standards act of 1938, as amended, except in any case where application of such minimum wage provisions would result in a lower minimum wage than provided in this act . . ." M.S.A. § 17.255(14).

Defendants contend that under this language, the Michigan Minimum Wage Law is inapplicable to the present suit because both drug companies, as interstate manufacturers, are jurisdictionally subject to the Fair Labor Standards Act of 1938, which act provides for higher wages than the Michigan law. Plaintiffs, on the other hand, would construe

Section 14 to mean only that employers who are required to pay the federal minimum wage under the FLSA are not subject to the Michigan Minimum Wage Law, provided the federal wage rate is the higher of the two. Hence, if a Michigan employer were jurisdictionally subject to the FLSA, due to the interstate nature of its enterprise, but were excused from paying the federal minimum wage rate for some reason, then that employer would be subject to the Michigan Minimum Wage Law.

Neither plaintiffs nor defendants have cited any cases in support of their respective constructions of Section 14. It would seem, however, that public policy favors plaintiffs on this point. The narrower construction defendants advocate would permit Michigan employers who escape paying the federal minimum wage to also escape paying the Michigan minimum wage. Such a result is not required under the doctrine of federal pre-emption.

Yet while the court holds that defendant drug companies are jurisdictionally subject to the Michigan Minimum Wage Law, it further finds plaintiffs are not employees within the meaning of that word as defined in the Act:

> " 'Employee' means an individual between the ages of 18 and 65 years employed by an employer on the premises of the employer or at a fixed site designated by the employer." M.S.A. § 17.255(2)(b).

Employ, in turn, means ". . . to engage, suffer or permit to work." M.S.A. § 17.255(2)(d).

Although those definitions, enacted in 1964, have never been construed, the Michigan Supreme Court has ruled that the common law test of a master-servant relationship is not determinative of whether one person is employed by another under the State's Workmen's Compensation Act and Employment Security Act. Instead, the Michigan Supreme Court directed that in deciding if an employment relationship exists, ". . . for the purpose of remedial social legislation. . . ." the total factual situation surrounding the relationship must be examined; the test is one of "economic reality." *Goodchild v. Erickson*, 375 Mich. 289, 293 (1965); *Tata v. Muskovitz*, 354 Mich. 695, 699

(1959); *Foster v. Employment Security Commission*, 15 Mich. App. 96, 99-101 (1968).

Since the Michigan Minimum Wage Law is remedial legislation, the reasoning of the Michigan Supreme Court under the Employment Security Act and the Workmen's Compensation Act would apply equally as well to it, and the entire fabric of plaintiffs' relationship to defendants must be examined in determining whether plaintiffs are, in economic reality, employees of defendants within the meaning of the Michigan Minimum Wage Law.

But the court has already made such an examination under Count I and decided on the affidavits submitted by the parties that plaintiffs are not employees of defendants within the meaning of the Fair Labor Standards Act. Since the economic reality test is likewise applicable to plaintiffs' claim under the Michigan Minimum Wage Law, defendants are similarly entitled to summary judgment on Count II. Thus, the court will treat defendants' motion to dismiss Count II as one for summary judgment under Rule 12(c) which provides:

> "If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, . . ." Rule 12(c) F.R.C.P.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON COUNT III; DEFENDANT DRUG COMPANIES' CROSS-MOTION FOR SUMMARY JUDGMENT ON COUNT III; MOTION TO DISMISS FILED BY DEFENDANT DEPARTMENT OF CORRECTIONS, THE DIRECTOR OF THE DEPARTMENT OF CORRECTIONS, AND MEMBERS OF THE CORRECTIONS COMMISSION.

Count III of the amended complaint alleges a claim for damages under Michigan law which involves factual allegations similar to those raising a federal question in Count IV and is before the court under its pendent jurisdiction. In Count III, plaintiffs state that their services

were utilized by defendant drug companies pursuant to agreements between the drug companies and the Michigan Department of Corrections which are illegal under Section 5 of the Michigan Prison Industries Act, 210 P.A. 1935, Com. Laws 1948, § 800.305:

> "... nor shall labor of prisoners be sold, hired, leased, loaned, contracted for or otherwise used for private or corporate profit or for any other purpose than the construction, maintenance or operation of public works, ways, or property as directed by the Governor: ..." (§ 28.1525 M.S.A.)[1]

Because of the alleged illegality of those labor contracts under Section 5, plaintiffs conclude that they have a cause of action under Michigan law, in either tort or implied contract, for the reasonable value of their services against the defendant drug companies, the defendant Department of Corrections, its Director and the individual members of the Corrections Commission.

Plaintiffs have now moved for summary judgment on Count III, while defendant drug companies have filed a cross-motion for summary judgment on this Count. In addition, defendant Department of Corrections, its Director, Gus Harrison, and the individual members of the Michigan Corrections Commission have filed a motion to dismiss Count III on the ground that plaintiffs have failed to state a claim entitling them to relief. Since, however, that motion to dismiss has been accompanied by another affidavit of Warden Kropp, the court will treat it as one for summary judgment under Rule 12(c), which provides:

> "If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated

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[1] Section 5 of the Michigan Prison Industries Act, 210 P.A. 1935, Com. Laws 1948, § 800.305, is now Section 6 of the Michigan Correctional Industries Act, 15 P.A. 1968, Com. Laws, § 800.326.

> as one for summary judgment and disposed of as provided in Rule 56, . . ." Rule 12(c) F.R.C.P.

The question raised by the above motions is whether on the uncontroverted facts, as already discussed in Count I, any of the parties are entitled to judgment as a matter of Michigan law. Those facts are:

1. Plaintiffs are or were legally incarcerated in Jackson Prison (Plaintiffs' Stipulation on Oral Arguments).

2. Pursuant to contracts between defendant drug companies and defendant Department of Corrections, the latter "furnished labor" to the drug companies for use in the research clinics built by the companies in the prison, but owned by the State of Michigan. (Plaintiffs' Brief of October 30, 1969, p. 3).

3. The plaintiff inmates worked in the clinics by order of the Department of Corrections just as "they would be ordered to work in any other prison industry." (Plaintiffs' Brief of October 30, 1969, p. 4).

4. Defendant drug companies paid certain sums to the State of Michigan for the labor of the inmates assigned to the clinics, according to monthly charges made by the Department of Corrections. (Plaintiffs' Brief of October 30, 1969, p. 5). On those facts, defendants maintain that even if the labor contracts were illegal under Section 5 of the Michigan Prison Industries Act, plaintiffs do not have a cause of action against any of the defendants for the reasonable value of their services, and that defendants are, therefore, entitled to judgment as a matter of Michigan law.

Although no Michigan court has ever decided whether a violation of Section 5 of the Michigan Prison Industries Act gives rise to a claim for damages, we believe that such a violation by defendants would not, on the present facts, create a cause of action for money damages in favor of plaintiffs. Instead, that Act authorizes criminal prosecution as the remedy for its wilful violations:

> "Violations. Sec. 14. Wilful violation of any of the provisions of this act by an officer of the state or of any political subdivision thereof, or by any officer

of any institution of either, shall be sufficient cause for removal from office; and such officer shall also be subject to prosecution as hereinafter provided." M.S.A. § 28.1534.[2]

"Penalty. Sec. 15. Any person, firm or corporation who shall wilfully violate any of the provisions of this act, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred [100] dollars nor more than five hundred [500] dollars, or by imprisonment in the county jail for a period of not more than ninety [90] days, or by both fine and imprisonment, at the discretion of the court." M.S.A. § 28.1535.[3]

While an action for damages may be inferred from a criminal statute even though that statute does not expressly authorize a civil damage suit, nevertheless it is generally recognized that a plaintiff must first demonstrate he falls within the class of persons the criminal statute was intended to protect before he can base a civil action for damages on a violation of criminal law. *Wyandotte Co. v. United States*, 389 U.S. 191, 202 (1967).

Section 5 of the Michigan Prison Industries Act, however, was never intended to protect inmates incarcerated in Mich-

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[2] Section 14 of the Michigan Prison Industries Act is now Section 13 of the Michigan Correctional Industries Act, which provides:

"Wilful violations of any of the provisions of this act by an officer of the state or of any political subdivision thereof, or by any officer of any institution of either shall be sufficient cause for removal from office, and subject such officer to prosecution as provided in section 14." Com. Laws § 800.333, M.S.A. § 28.1540(13).

[3] Section 15 of the Michigan Prison Industries Act is now Section 14 of the Michigan Correctional Industries Act, which provides:

"Any person, firm or corporation who wilfully violates any of the provisions of this act is guilty of a misdemeanor." Com. Laws, § 800.334, M.S.A. § 28.1540-(14).

igan prisons from being compelled to perform services for private corporate profit. Rather, the primary purpose of that Section is, in pertinent part:

> "(e) to eliminate all competitive relationships between prisoner labor . . . and free labor. . . ." Section 10, Michigan Prison Industries Act, Com. Laws, § 800.310(e), M.S.A. § 28.1530.[4]

Hence, it is the work force outside the prison walls, not prison inmates, that the Michigan legislature was attempting to protect by the enactment of Section 5. Since plaintiffs are not the intended beneficiaries of Section 5, they cannot pursue an action for damages based on a violation of that Section.

There is a second reason why plaintiffs cannot recover damages from defendants on the present facts. That is because defendants' allegedly illegal utilization of plaintiffs' labor did not, as plaintiffs contend, deprive them of any property to which they were entitled. Instead, the thrust of the Michigan Prison Industries Act[5] is that the labor of inmates lawfully incarcerated in Michigan penitentiaries and working on the order of prison officials belongs to the State, rather than to the inmates. This construction of the Act earlier received the approval of the Federal District Court for the Western District of Michigan in *Huntley v. Gunn Manufacturing Co., supra*, when Judge Starr concluded on almost identical facts:

> "[i]t is clear that the labor of the plaintiffs as inmates of the State prison belonged to the State of Michigan." 79 F.Supp. at 113.

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[4] Section 10 of the Michigan Prison Industries Act is now Section 11 of the Michigan Correctional Industries Act; Com. Laws, § 800.331, M.S.A. § 28.1540 (11).

[5] The Michigan Prison Industries Act, 210 P.A. 1935, Com. Laws, §§ 800.301-319, has been repealed by the Michigan Correctional Industries Act, 15 P.A. 1968, Com. Laws, §§ 800.321-335. The 1968 Act, however, is substantially identical in content to the 1935 Act.

Since plaintiffs had no right to their own labor, or to its fruits, at the time they were ordered to perform the services they now challenge as being illegal, plaintiffs are not entitled to recover the reasonable value of those services under any theory of action recognized by Michigan law.

Plaintiffs, however, would have the court construe Section 5 of the Michigan Prison Industries Act as conferring on inmates the right to the fruits of their labor when that labor has been illegally used, through no fault of the inmates, in competition with private industry. But, as already noted, the purpose behind the enactment of Section 5 was to protect the free labor market, not to give incarcerated criminals any rights regarding the disposition of their labor.

The only case suggesting that a violation of a state statute regulating the uses of prison labor may create an action for damages in favor of the prisoners whose labor was unlawfully used is *Sloss Iron and Steel Company v. Harvey*, 116 Ala. 636, 22 So. 994 (1897). In *Sloss*, the Alabama Supreme Court denied the plaintiff prisoners' claim for relief *ex contractu*, but said, in dicta, that defendants' acts in extracting work from the prisoners on Sunday, in violation of a statute prohibiting such Sunday labor, was tortious. Yet, *Sloss* is distinguishable from the present situation because there the court found that the law prohibiting Sunday labor by prisoners "... was enacted for the benefit of the convict." 116 Ala. at 657.

Since Section 5 of the Michigan Prison Industries Act was not intended to protect inmates, and since plaintiffs as inmates have not been deprived of any property belonging to them under Michigan law by defendants' utilization of their labor, the court concludes that defendants are entitled to judgment on the stipulated facts. Summary judgment will, therefore, be entered for defendants on Count III.

DEFENDANT DRUG COMPANIES' MOTION FOR SUMMARY JUDGMENT ON COUNT IV AND MOTION TO DISMISS FILED BY DEFENDANT DEPARTMENT OF CORRECTIONS, ITS DIRECTOR, AND THE MEMBERS OF THE MICHIGAN CORRECTIONS COMMISSION

In Count IV of their complaint, plaintiffs ask for money damages under 42 U.S.C. § 1983, alleging that the "illegal utilization . . . of plaintiffs' labor by all the Defendants And the payment by Defendants Parke, Davis and Company and the Upjohn Company of nominal wages less than those required by law" has resulted in: (1) the deprivation of plaintiffs' property without due process of law as required by the Fourteenth Amendment; (2) the holding of plaintiffs in involuntary servitude contrary to the Thirteenth Amendment to the Federal Constitution; and (3) the denial to plaintiffs of equal protection of laws as required by the Fourteenth Amendment. Defendant drug companies have moved for summary judgment on this count. In addition, the Michigan Department of Corrections, its Director, and the members of the Michigan Corrections Commission have filed a motion to dismiss Count IV as failing to state a claim entitling plaintiffs to relief. That motion to dismiss will be treated as one for summary judgment for the reasons already discussed under Count III.

The facts relevant to a determination of the present motions are those previously enumerated under Count III, and some additional facts established by uncontroverted statements in an affidavit of Warden Kropp. According to Warden Kropp: (1) inmates performing labor in the research clinics are paid at somewhat higher daily rates than are inmates performing similar labor in other prison industries; (2) the recreational facilities and, at times, the food available to inmates working in the research clinics are superior to the recreational facilities and the food available to prisoners working in other prison industries; (3) inmates working in the research clinics are given more freedom by prison authorities than are inmates working in most other prison industries. On these

facts, defendants maintain that they are entitled to a judgment as a matter of law. We agree.

Plaintiffs' claim that their work in the research clinics constitutes a form of involuntary servitude is without merit. Lawfully convicted criminals may be required to work by prison authorities for: "There is no federally protected right of a state prisoner not to work while imprisoned after conviction. . . . [t]his is not the sort of involuntary servitude which violates Thirteenth Amendment rights." *Draper v. Rhay*, 315 F.2d 193, 197 (Ninth Cir. 1963). Indeed, the Thirteenth Amendment expressly excepts punishment for a crime from its prohibitions against involuntary servitude:

> "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Since plaintiffs do not maintain that they were illegally convicted, their claim that they have been held in involuntary servitude by defendants is groundless.

On oral argument, plaintiffs' attorney indicated that the due process and equal protection claims raised by Count IV are based wholly on the alleged unlawfulness under Michigan law of defendants' utilization of plaintiffs' labor. As we now understand the legal argument underlying Count IV, it is that a violation of the Michigan statute prohibiting competition between prison labor and free labor automatically deprives the prisoners whose labor is used contrary to this mandate of their Fourteenth Amendment rights.

Yet, merely because penal officials have treated state prisoners at variance with the applicable state law does not, in itself, constitute a violation of the due process or equal protection rights of those prisoners. That was the precise conclusion reached by the Courts of Appeal for the Eighth and Ninth Circuits in two decisions which we elect to follow. *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963); *Sigler v. Lowrie*, 404 F.2d 659, 662 (8th Cir. 1968). If the rule were otherwise, every erroneous decisions on state law matters would come before the

federal court as a Constitutional question. *Hughes v. Heinze*, 268 F. 2d 865, 870 (9th Cir., 1959).

But even if the allegations in Count IV are construed more broadly than plaintiffs' attorney suggested on oral argument, they still do not present a cause of action under 42 U.S.C. § 1983 for the denial of due process rights. To raise such a claim, those allegations, or the facts already established, must indicate that plaintiffs have been deprived of some fundamental Constitutional right which follows them into their prison cells.

> "Lawful incarceration brings about the necessary withdrawal of limitation of many privileges and rights, a withdrawal which is justified by the considerations underlying our penal system. To argue that the incarcerated person can only be incarcerated and not be deprived of the average person's ordinary rights as he would have had them if the prisoner were not convicted and sentenced and confined is, as a matter of common ordinary logic, absurd. It is only where fundamental, humane and necessary rights are breached that the constitutional protections become involved." *Ray v. Commonwealth of Pennsylvania*, 263 F.Supp. 630, 631 (W.D. Pa., 1967).

A failure, however, to pay plaintiffs for their labor in the clinics at its reasonable value is not a denial of such a fundamental Constitutional right. *Sigler v. Lowrie*, supra at 661.

Plaintiffs have likewise failed to contend that defendants purposefully discriminated against them, as opposed to other prisoners in the same class, when defendants allegedly used prison labor contrary to Section 5 of the Michigan Prison Industries Act. That purposeful discrimination is a necessary element in the present case under the equal protection clause of the Fourteenth Amendment.

> "Appellant asserts . . . that he is being held in the state penitentiary, and that in accordance with state law, he should be in the county jail . . . No denial of equal protection is shown unless there is shown intentional or

purposeful discrimination between persons or classes." *Draper v. Rhay, supra* at 198.

Moreover, the uncontroverted facts already discussed show that the effects of the alleged violation of Michigan law was to confer tangible benefits on inmates like plaintiffs who received clinic assignments, for they received higher wages, more freedom, and labored under better working conditions than did the inmates performing similar work but in different prison industries.

In view of the above findings, it is unnecessary to determine whether defendants have, in fact, violated Section 5 of the Michigan Prison Industries Act or whether each defendant has acted under color of law sufficient to subject it to liability under 42 U.S.C. § 1983. Rather, we hold only that even if defendants used plaintiffs' labor contrary to Michigan law, and even if defendants acted under color of state law in so doing, plaintiffs have suffered no denial of federally protected rights. For this reason, defendants' motions for summary judgment on Count IV are granted.

Appropriate orders may be submitted.

(s) Ralph M. Freeman
Chief Judge

Dated: Detroit, Michigan
January 5, 1971.

APPEARANCES:

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ORDER GRANTING DEFENDANTS' MOTIONS PERTAINING TO CLASS ACTION, TO DISMISS AND FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
(Filed February 2, 1971)

At a session of said Court held in the Federal Building, Detroit, Michigan on the 2nd day of February A.D., 1971.

Present: Ralph M. Freeman, United States District Judge

The parties herein having filed various motions described below, and

The Court having considered the pleadings in this cause and the extensive briefs and oral arguments pertaining to such motions, and

The Court having filed its opinion herein on January 5, 1971, setting out its findings of fact and conclusions of law, and

The Court being fully advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1. Defendants' (Parke Davis & Co. and The Upjohn Company) Motion For Order That Plaintiffs' Action Shall Not Be Maintained As A Class Action is hereby granted.

2. Defendants' (Parke Davis & Co. and The Upjohn Company) Motion For Summary Judgment On Count I Of Complaint is hereby granted.

3. Defendants' (Parke Davis & Co. and The Upjohn Company) Motion To Dismiss Count II Of Complaint (treated as a motion for summary judgment pursuant to Rule 12(c), F.R.C.P.) is hereby granted.

4. Defendants' (Parke Davis & Co. and The Upjohn Company) Motion For Summary Judgment With Respect To Count III, and Defendants' (other than Parke Davis & Co. and The Upjohn Company) Motion To Dismiss Count III (treated as a motion for summary judgment pursuant to Rule 12(c) F.R.C.P.) are hereby granted.

5. Defendants' (Parke Davis & Co. and The Upjohn Company) Motion For Summary Judgment With Respect To Count IV and Defendants' (other than Parke Davis & Co. and The Upjohn Company) Motion To Dismiss Count IV (treated as a motion for summary judgment pursuant to Rule 12(c), F.R.C.P.) are hereby granted.

6. The Motion For Summary Judgment By Plaintiffs Pursuant To Rule 56 Of The Federal Rules Of Civil Procedure (pertaining to Count III) is hereby denied.

Ralph M. Freeman
Chief Judge

Approved as to form:

(s) Robert L. Segar, Esq.
Leitson, Dean, Deah, Abram, Segar & Hart
804 Detroit Street
Flint, Michigan 48503 235-5631
Attorneys for Plaintiffs

APPENDIX C — TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

FEDERAL AND STATE CONSTITUTIONAL AND STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

The text of the Federal and State Constitutional and Statutory Provisions and Rules Involved are as follows:

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 29, *United States Code*, Section 203(d) provides in pertinent part as follows:

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State (except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the

operation of a railway or carrier referred to in such sentence), or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

Title 29, *United States Code*, Section 203(e) provides in pertinent part as follows:

"(e) 'Employee' includes any individual employed by an employer. . . ."

Title 29, *United States Code*, Section 203(g) provides in pertinent part as follows:

"(g) 'Employ' includes to suffer or permit to work."

Rule 23(a) (1), *Federal Rules of Civil Procedure*, provides in pertinent part as follows:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable. . . ."

Volume 19, *Michigan Compiled Laws Annotated*, Section 408.382 provides in pertinent part as follows:

"Sec. 2. As used in this act:

(a) 'Commissioner' means the commissioner of labor.

(b) 'Employee' means an individual between the ages of 18 and 65 years employed by an employer on the premises of the employer or at a fixed site designated by the employer.

(c) 'Employer' means any person, firm or corporation, including the state and its political subdivisions, agencies and instrumentalities, and any person acting in the interest of such employer, who employs 4 or more employees at any one time within any calendar year. Such employer shall be subject to this act during the remainder of such calendar year.

(d) 'Employ' means to engage, suffer or permit to work''

Volume 19, *Michigan Compiled Laws Annotated*, Section 408.394 provides in pertinent part as follows:

''Sec. 14. The provisions of this act shall not apply to an employer who is subject to the minimum wage provisions of the federal fair standards act of 1938, as amended, except in any case where application of such minimum wage provisions would result in a lower minimum wage than provided in this act, . . .''

Volume 41, *Michigan Compiled Laws Annotated*, Section 800.305 provides in pertinent part as follows:

''Sec. 5. From and after 60 days after this act shall become law it shall be unlawful to sell or exchange or to offer for sale or exchange, or to purchase any prision products, except pure bred livestock raised on the several prison farms and sold for breeding purposes, otherwise than for use or consumption in the penal, charitable and/or other custodial institutions of this state or for departments of this state, or political subdivisions thereof, or the federal government or agencies thereof, or otherwise as specifically provided in this act; nor shall the labor of prisoners be sold, hired, leased, loaned, contracted for or otherwise used for private or corporate profit or for any other purpose than the construction, maintenance or operation of public works, ways or property as directed by the governor; except that the prisoners of a county or of a city may be used on the public works, ways or property of said county or city as directed by the constituted authority thereof: Provided, That nothing in this act shall be deemed to prohibit the sale at retail, of articles made by prisoners for the personal benefit of themselves or their dependents, or the payment to prisoners for personal services rendered in the penal institution, subject to regulations approved by the prison commission, or the manufacture, sale or purchase of binder twine, rope and cordage used in

agricultural production, or to the use of prison labor upon agricultural land which has been rented or leased by the department of corrections upon a share cropping or other basis: Provided, That in no case shall any prison products be sold or offered for sale at a price below cost of production which cost of production shall include materials, labor supervision, distribution and selling, heat, light, power and all other expenses connected therewith."

Volume 41, *Michigan Compiled Laws Annotated*, Section 800.310 provides in pertinent part as follows:

"Sec. 10. It is hereby declared to be the intent of this act:

(a) to provide adequate, regular, diversified and suitable employment for prisoners of the state consistent with proper penal purposes;

(b) to utilize the labor of prisoners exclusively for self-maintenance and for reimbursing the state for expenses incurred by reason of their crimes and imprisonment;

(c) to eliminate all competitive relationships between prisoner labor or prison products and free labor or private industry;

(d) to effect the requisitioning and disbursement of prisoner labor and prison products directly through established state authorities with no possibility of private profits therefrom and with the minimum of intermediating financial considerations, appropriations or expenditures; and to these ends . . .

APPENDIX D — AGREEMENT BETWEEN UPJOHN AND DEPARTMENT OF CORRECTIONS

AGREEMENT

The following agreement covers the method of construction, the operation and the ownership of a Clinical Research Building at the State Prison of Southern Michigan at Jackson:

1. The Upjohn Company will retain the services of an architect, and will contract for the construction of a Clinical Research Building at the State Prison of Southern Michigan.
2. The Upjohn Company will pay the entire expense of planning and constructing the building.
3. The plans and specifications for the Clinical Research Building must be approved by both the Department of Corrections and The Upjohn Company.
4. The Upjohn Company will purchase all necessary equipment for the building and the portable research equipment will remain the property of the company.
5. Upon acceptance of the completed project by the Department of Corrections, the building and fixed equipment shall become the property of the State of Michigan. The proceeds of any insurance protection on the building or contents against damage shall be used to restore the facility, such insurance shall be provided by the Upjohn Company.
6. In the event of abandonment of a partially completed project, any materials and equipment at the construction site shall become the property of the Department of Corrections.
7. The Upjohn Company will heat, light, administer, maintain the building, and provide necessary supervision at its own expense. However, custody and security will be the responsibility of the Department of Corrections.

8. The Upjohn Company and only the Upjohn Company will have the right to use the building for clinical research so long as clinical research is conducted by any organization or corporation at the State Prison of Southern Michigan.
9. The Upjohn Company will be responsible for the conduct of the clinical research in the Clinical Research Building. They will abide by the policies of the Department of Corrections and the laws of Michigan and the United States.
10. The Department of Corrections will take all reasonable steps to facilitate the conduct of clinical research by the Upjohn Company. The Department of Corrections will permit prisoners to volunteer to participate as subjects in the clinical research.
11. The Department of Corrections will appoint a Medical Advisory Committee composed of several qualified faculty members from Michigan Medical Schools which will review the operations on a yearly basis. The Committee will either approve or suggest changes in the procedures used in the clinical research.
12. The Upjohn Company agrees to indemnify the State of Michigan for any additional expenditures incurred by a volunteer inmate suffering from a drug incurred illness or disability.
13. The Upjohn Company agrees to continue to clear all of its research projects with the Department of Corrections before initiating them at the prison.

The Upjohn Company

By (s) R. S. Schreiber
Vice President

Date: November 15, 1963

Michigan Department of Corrections

By (s) Gus Harrison
Director

Date: 11-21-63

APPENDIX E — AGREEMENT BETWEEN PARKE-DAVIS AND DEPARTMENT OF CORRECTIONS

AGREEMENT

Contract No. 10-12

The following agreement covers the method of construction, the operation and the ownership of a Clinical Research Building at the State Prison of Southern Michigan at Jackson:

1. The Parke-Davis Company will retain the services of an architect, and will contract for the construction of a Clinical Research Building at the State Prison of Southern Michigan.
2. The Parke-Davis Company will pay the entire expense of planning and constructing the building.
3. The plans and specifications for the Clinical Research Building must be approved by both the Department of Corrections and the Parke-Davis Company.
4. The Parke-Davis Company will purchase all necessary equipment for the building, and the portable research equipment will remain the property of the company.
5. Upon acceptance of the completed project by the Department of Corrections, the building and fixed equipment shall become the property of the State of Michigan. The proceeds of any insurance protection on the building or contents against damage shall be used to restore the facility, such insurance shall be provided by the Parke-Davis Company.
6. In the event of abandonment of a partially completed project, any materials and equipment at the construction site shall become the property of the Department of Corrections.
7. The Parke-Davis Company will heat, light, administer, maintain the building, and provide necessary supervision at its own expense. However, custody and security will be the responsibility of the Department of Corrections.

8. The Parke-Davis Company and only the Parke-Davis Company will have the right to use the building for clinical research so long as clinical research is conducted by any organization or corporation at the State Prison of Southern Michigan.
9. The Upjohn Company will be responsible for the conduct of the clinical research in the Clinical Research Building. They will abide by the policies of the Department of Corrections and the laws of Michigan and the United States.
10. The Department of Corrections will take all reasonable steps to facilitate the conduct of clinical research by the Parke-Davis Company. The Department of Corrections will permit prisoners to volunteer to participate as subjects in the clinical research.
11. The Department of Corrections will appoint a Medical Advisory Committee composed of several qualified faculty members from Michigan Medical Schools which will review the operations on a yearly basis. The Committee will either approve or suggest changes in the procedures used in the clinical research.
12. The Parke-Davis Company agrees to indemnify the State of Michigan for any additional expenditures incurred as a result of a volunteer inmate suffering from a drug incurred illness or disability.
13. The Parke-Davis Company agrees to continue to clear all of its research projects with the Department of Corrections before initiating them at the prison.

Parke, Davis & Company

By (s) (Not Legible)
President

Date: Nov. 13 1963

Michigan Department of Corrections

By (s) Gus Harrison
Director

Date: 11-18-63

APPENDIX F — AMENDED COMPLAINT

UNITED STATES DISTRICT COURT

For the Eastern District of Michigan
Southern Division

CALVIN SIMS, RICHARD ALLEN, FRANK ROGERS, BILLY LEE WILLIAMS, WALTER LEE, BOYD SLAGER, PETER GEORGE MILLS, LEE D. WALKER, CLEMONT DEBEAUX, ORDELL VILBURN, WILLIAM CLEARY, HERBERT WILLIAMS, FRED HOLNAGEL, BENNY SPELLS, KENNETH INMAN, RAYMOND L. BAILEY, ORCEAN DAVIS, JERRY MACK, BOYD KELTON, THOMAS H. LORD, RALPH WATSON, CHESTER A. SAWICKI, PHILLIP MCGHEE, VERNON D. MEVIS, RALPH R. WARNER,

Plaintiffs,

vs.

Case No. 31172
Judge Freeman

PARKE DAVIS & Co., a Michigan Corporation and THE UPJOHN Co., a Delaware Corporation, ELEANOR HUTZEL, JAMES E. WADSWORTH, ERNEST C. BROOKS, MAX BIBER, C. J. FARLEY, JOHN W. RICE, DUANE L. WATERS, FLORENCE CRANE, JOSEPH J. GROSS, G. ROBERT COTTON, and GUS HARRISON,

Defendants.

Plaintiffs complaint of Defendants as follows:

COUNT I

1. Jurisdiction of this Court is grounded upon:

Title 29 United States Code Annotated: Sec. 216 (6) (Sec. 16(b) of the Fair Labor Standards Act of 1938 as amended).

Title 28 United States Code Annotated: Sec. 1337 giving the District Court original jurisduction of "Any civil action or proceedings arising under any Act of Congress regulating commerce" without regard to citizenship of the parties or amount in controversy.

Title 28 United States Code Annotated: Sec. 1343.

Title 42 United States Code Annotated: Sec. 1983.

Thirteenth Amendment to the United States Constitution.

Fourteenth Amendment to the United States Constitution.

2. This action is brought in part (Count I) pursuant to Sec. 16 (6) of the Fair Labor Standards Act of 1938 (29 U.S.C.A., Sec. 201-219) to recover from Defendants' unpaid minimum wages and overtime compensation, interest on said amounts since due, an equal additional amount as liquidated damages, Court costs and a reasonable attorney's fee.

3. Plaintiffs are or have been inmates of the State Prison of Southern Michigan a Jackson, Michigan, at all times relevant to this cause of action. Defendant Parke Davis & Co. is a Michigan Corporation for private profit engaged in the drug industry and Defendant The Upjohn Company is a Delaware Corporation for private profit similarly engaged. Both Defendants are doing business throughout the State of Michigan, and in interstate commerce. Defendant Department of Corrections is a corporation formed by and pursuant to Act Number 232 of the Public Acts of 1953 and is charged by said act with supervising, controlling and managing the administration of penal institutions in general and prison labor and industries in particular. The individual members named are or have been members of said Department of Corrections at times relevant to Plaintiffs' cause of action. Defendant Harrison is the Director of said Department.

4. There are numerous other people who either are or have been inmates in the State Prison of Southern Mich-

igan at Jackson, Michigan, who have the same cause of action as hereinafter set forth on the part of the named Plaintiffs, and the named Plaintiffs adequately represent such unnamed people. This action is brought pursuant to Rule 23 A of the Federal Rules of Civil Procedure on behalf of all such people whose number make it impractical to have them join as Plaintiffs. The named Plaintiffs adequately represent said class.

5. In 1963 the named Defendants Parke Davis & Co. and The Upjohn Co. erected within the State Prison of Southern Michigan at Jackson, Michigan, research clinics for the private profit making purposes of said corporations and said clinics have been continuously and are currently in operation. The activities in said clinics among other things include the clinical testing of drugs not presently on the market as well as the testing of drugs currently being produced for, sold, transported, shipped and delivered in interstate commerce throughout the United States. Defendants are enterprises engaged in interstate commerce within the meaning of 29 U.S.C.A., Sec. 203.

6. Certain inmates of said prison including Plaintiffs were picked by Defendants Parke Davis & Co. and The Upjohn Co. in conjunction with representatives of the Michigan Department of Corrections to be employed by Defendants Parke Davis & Co. and The Upjohn Co. at the aforesaid research clinics. The work therein by said inmates is carried on under the sole direction and supervision of Defendants Parke Davis & Co.'s and The Upjohn Co.'s representatives, and said employees work on a regular basis up to as much as one hundred twelve (112) hours per week.

7. The work carried on by the named Plaintiffs and other inmates is exactly the same work that would be required of nonprison personnel working in comparable capacities. The wages paid by the respective private corporate Defendants to each worker range from Thirty-Five Cents ($0.35) to One Dollar and 25/100 ($1.25) per day and all other costs of running the clinic are paid by said Defendants, such as power, heat and water.

8. Among the job classifications of the inmates are the following: Chief Technician (in each classification):

Trained Technician (in all classified areas); Technician Trainees (in all classified areas); Chief Clerk; Clerks; Nurse Supervisor; Nurse; Chief Cook; Kitchen Assistant; Kitchen Pot and Pan Man; Maintenance Man; Head Porter.

9. All of the activity by Plaintiffs inures to the benefit of the stockholders of Defendant private corporations and involves work which if not accomplished by said inmates would have to be accomplished by civilian help paid in accordance with applicable federal and state laws.

10. Plaintiffs were and are employees of Defendants Parke Davis & Co. and The Upjohn Co. within the meaning of the Fair Labor Standards Act of 1938 as amended, 29 U.S.C.A., Sec. 201 et seq. and were and are entitled to be paid the minimum wages provided for in said act. All of the acts and actions complained of by Plaintiffs were accomplished by the agreement and cooperation of all the Defendants, both corporate and individual, named herein; and the illegal utilization of Plaintiffs' labor inured to the benefit of all Defendants. Further, said actions constituted in fact or in law an attempt to evade, avoid and violate the laws of the State of Michigan regarding the use of prison labor for private profit, and the laws of Michigan and the United States regulating the minimum wage to be paid for labor.

11. Plaintiffs are entitled to recover from Defendants the difference between the amounts received by each Plaintiff and the minimum wage guaranteed by said law; all overtime compensation that may be due; and equal additional amount as liquidated damages; courts costs and a reasonable attorney's fee as well as interest due on said back wages since they were due.

12. The number of hours and the amount and the overtime worked by each Plaintiff as well as the amounts actually paid to each Plaintiff is within the knowledge of the Defendants through the records which they keep regarding Plaintiffs' employment.

WHEREFORE, Plaintiffs seek judgment against Defendants in the amount of One Million ($1,000,000.00) Dollars plus interest, costs and attorney's fee.

COUNT II

1. Plaintiffs refer to and by such reference hereby incorporate as though expressly repeated herein the allegations of paragraphs one (1) through twelve (12) of Count I hereof.

2. The employment of Plaintiffs by Defendants as alleged aforesaid is in violation of Act Number 154 of the Public Acts of 1964 of the State of Michigan commonly known as the Minimum Wage Law of 1964 being Sec. 408.-381 of the compiled laws of the State of Michigan.

3. Should this Court determine that the Fair Labor Standards Act of 1938 as amended does not apply to Defendant employers herein then the Minimum Wage Law of the State of Michigan would apply as set out in Sec. 14 thereof, and this action is based in part upon Sec. 13 of said act and seeks recovery of the difference between the amounts paid to Plaintiffs and the minimum wage provided by said Minimum Wage Law and for an equal additional amount as liquidated damages together with interest, costs and a reasonable attorney's fee.

4. Defendants are employers and Plaintiffs employees within the meaning of said Minimum Wage Law.

WHEREFORE, Plaintiffs seek judgment against Defendants in the amount of One Million ($1,000,000.00) Dollars plus interest, costs and attorney's fee.

COUNT III

1. Plaintiffs refer to and by such reference incorporate herein as though expressly repeated the allegations of paragraphs one (1) through twelve (12) of Count I hereof.

2. The utilization of the labor of said inmates by Defendants is expressly contrary to the law of the State of Michigan and particularly Sec. 800.305 of C.L. 48 which provides in pertinent part . . .

> "Nor shall the labor of prisoners be sold, hired, leased, loaned, contracted for or otherwise used for private or corporate profit or for any other purpose than the construction, maintenance or operation of public

works, ways, or property as directed by the Governor."

and Sec. 800.310 C.L. 48 which provides in pertinent part:

"It is hereby declared to be the intent of this act:

(A) To provide adequate, regular, diversified and suitable employment for prisoners of the State consistent with proper penal purposes;

(B) To utilize the labor of prisoners exclusively for self maintenance and for reimbursement of State for expenses incurred by reason of their crimes and imprisonment;

(C) To eliminate all competitive relationships between prisoner, labor or prison products and free labor or private industry;

(D) To affect the requisitioning and disbursement of prison labor and prison products directly through established state authorities with no possibility of private profits therefrom and with the minimum of intermediating financial considerations, appropriations or expenditures; . . ."

3. The utilization of the services and labor of Plaintiffs for Defendants' own private profit and interest has resulted in and is resulting in the unjust enrichment of Defendants in the amount by which the reasonable value of Plaintiffs' services exceeds the amount paid by Defendants to Plaintiffs. The labor of Plaintiffs has been and is being utilized by Defendants with full knowledge that they are benefiting unjustly and illegally by the difference between the amount paid to Plaintiffs and the reasonable value of their services.

4. In addition, Defendants other than Parke Davis & Co. and The Upjohn Co. have been unjustly enriched and benefited from the illegal use of Plaintiffs' labor by the acquisition for the State Prison of Southern Michigan of a building (i.e. the structure housing the clinic) which cost approximately $300,000.00 to construct and whose replacement cost would be far greater today.

5. Plaintiffs' labor was utilized as alleged by Defendants without Plaintiffs' consent and under coercion and implied threat of retribution if they did not work for Parke Davis & Co. and The Upjohn Co. as ordered.

6. The reasonable value of Plaintiff's services is at least the amount which would be due them under the Minimum Wage Laws of the State of Michigan and the United States of America.

7. Plaintiffs have, therefore, been unjustly deprived of their labor and the fruits thereof in violation of the laws of the State of Michigan as hereinbefore set forth.

8. The contracts existing between Plaintiffs and Defendants and between Defendants and any other party are void because of violation of the statutes of the State of Michigan regarding prison labor already set forth.

9. Plaintiffs are, therefore, entitled to recover from Defendants the reasonable value of their services in excess of the amounts paid by Defendants to Plaintiffs for same.

10. Plaintiffs are entitled to interest on the amount due to them under this count from the dates said amounts were due.

WHEREFORE, Plaintiffs seek judgment against Defendants in the amount of One Million ($1,000,000.00) Dollars, plus interest, costs and attorney's fee.

COUNT IV

1. Plaintiffs refer to an by such reference incorporate herein the allegations of paragraphs one (1) through twelve (12) of Count I hereof.

2. The illegal utilization and exploitation of Plaintiffs' labor by all Defendants and the payment by Defendants Parke Daivs & Co. and The Upjohn Co. of nominal wages less than those required by law has resulted and is resulting in a deprivation of the liberty and property of Plaintiffs without due process of law and in violation of the Fourteenth Amendment.

3. Said conduct has also resulted and is resulting in the holding of Plaintiffs in involuntary servitude contrary

to the Thirteenth Amendment of the Federal Constitution.

4. Said conduct was carried out under color of the laws of the State of Michigan dealing with supervision of prisoners.

5. Also as a result of said conduct Plaintiffs have been denied equal protection of the laws guaranteed by the Fourteenth Amendment, in that Plaintiffs have been and are being arbitrarily discriminated against in the amount of wages paid to them for their labor since others doing the same work or performing any service for private profit making corporations would be entitled to collect a reasonable wage therefor.

6. Jurisdiction under this court is grounded upon Sec. 1983 of Title 42 and Sec. 1343 of Title 28 of United States Code Annotated.

7. The actions complained of have proximately caused damages to Plaintiffs in the amount of One Million ($1,000,000.00) Dollars.

WHEREFORE, Plaintiffs seek judgment against Defendants in the amount of One Million ($1,000,000.00) Dollars, plus interest, costs and attorney's fee.

Leitson, Dean, Dean, Segar & Hart, P.C.
Attorneys for Plaintiffs

By: (s) Robert L. Segar

Dated: October 30, 1969.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-910

Calvin Sims, Richard Allen, Frank Rogers, Billy Lee Williams, Walter Lee, Boyd Slager, Peter George Mills, Lee D. Walker, Clemont Dedeaux, Ordell Vilburn, William Cleary, Herbert Williams, Fred Holnagel, Benny Spells, Kenneth Inman, Raymond L. Bailey, Orcean Davis, Jerry Mack, Boyd Kelton, Thomas H. Lord, Ralph Watson, Chester A. Sawicki, Phillip McGhee, Vernon D. Mevis, Ralph R. Warner, Ronald D. Kennedy, Paul Ross, Herman Head, Gerald G. Norman, Paul Miller, Thomas U. Mulligan, Lonnie Payne, Robert Mason, Gaylord L. Espich and Kenneth R. Marshall,

Petitioners,

v.

Parke, Davis & Co., a Michigan corporation, The Upjohn Co., a Delaware corporation, Department of Corrections of the State of Michigan, Eleanor Hutzel, James E. Wadsworth, Ernest C. Brooks, Max Biber, C. J. Farley, John W. Rice, Duane L. Waters, Florence Crane, Joseph J. Gross, G. Robert Cotton and Gus Harrison,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR ALL RESPONDENTS

(For Attorneys, See Inside Front Cover)

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR ALL RESPONDENTS

COUNTER-STATEMENT OF QUESTIONS PRESENTED*

I. Was Respondents' Motion for Summary Judgment on Count I correctly granted because uncontroverted facts established that the inmates were not "employees" of Respondent drug companies within the meaning of the Fair Labor Standards Act?

II. Was Respondents' Motion for Summary Judgment on Count II correctly granted because the uncontroverted facts established that the inmates were not "employees" of Respondent drug companies within the meaning of the Michigan Minimum Wage Law?

III. Was Respondents' Motion for Summary Judgment on Count III correctly granted because these lawfully confined prison inmates do not have a private cause of action for damages by reason of their work assignment to research clinics located within the prison walls, allegedly in violation of a Michigan statute designed to protect free labor from competition by prison labor?

IV. Was Respondents' Motion for Summary Judgment on Count IV correctly granted because, even assuming that the utilization of the inmates' labor was contrary to Michigan law, they suffered no denial of any rights protected by the United States Constitution?

---

* The procedural question arising under Fed.R.Civ.P. 23(a) is not discussed in this Brief because the District Court's granting of Summary Judgment on the merits on all counts of the Complaint rendered the class action issue moot.

COUNTER-STATEMENT OF THE CASE

For purposes of the Petition only, Respondents accept Petitioners' Statement of the Case. In addition, however, the following uncontroverted facts are relevant to the issues presented.

The research conducted at the clinics consists of very carefully planned and supervised testing of drugs, as required by the Federal Food and Drug Administration. Only inmates who volunteer and who are in excellent physical condition are accepted for the test programs. These inmate volunteers are not involved in this proceeding.

The test programs are developed and monitored by highly experienced medical and technical personnel of the Respondent drug companies. The tests are actually run under the supervision of technical personnel of the drug companies who work at the clinics in Jackson Prison. The Michigan Corrections Commission has assigned prison inmates to work at the research clinics to perform various tasks ranging from common labor (*e.g.*, janitorial tasks) to semi-technical work (*e.g.*, clerical tasks, operating EEG machine). See *Business Week* 58-61 (June 27, 1964). (Appendix A). All petitioners are members of this latter group. The legality of the imprisonment and detention of the inmates involved has not been challenged.

The research facilities operated by Parke Davis and Upjohn are located within the walls of Jackson Prison and generally provide conditions superior to other prison assignments, because the facilities are relatively new. Inmates on clinic assignment enjoy special recreation facilities, at times better food, more freedom and more contact

with non-prison personnel than inmates on most other prison assignments. Assignment to the clinics, therefore, has been regarded by the inmates as highly desirable—in fact, inmates frequently requested assignment to the research clinics. On the other hand, many of the specific classifications in the clinics have been considered valuable, educational and rehabilatative opportunities by the State Corrections Commission.

Daily rates for assignment to the research facilities, which were paid by the Corrections Commission into the respective inmates' accounts, were established by the Corrections Commission and are somewhat higher than rates for comparable work on other prison assignments.

The actual assignment of each and every inmate to his respective tasks within Jackson Prison is made by the Prison Director of Treatment, acting with the assistance of the Classification Committee. Requests for certain named inmates have been made by Parke Davis and Upjohn; some were granted by the prison authorities and some were denied. Conversely, certain inmates have been assigned to the research clinics without the prior knowledge or approval of the clinic administrators while others have been removed without their prior knowledge or approval. Indeed, certain inmates have been assigned to research facility tasks and others have been removed against the express wishes of the clinic administrators.

Once an inmate was assigned to either the Parke Davis or Upjohn research facility, he was subject to call at any time by any prison official, his hours were subject to approval by prison authorities, and he could be given time off for various reasons by the prison authorities without the approval of the research clinic administrator. Specific instructions and tasks assigned by the research facilities could be and, in fact, were vetoed by the prison authorities.

In short, as noted in the opinion of the District Court, the day-to-day supervision by Parke Davis or Upjohn of inmates assigned to the research facilities was always subject to the overriding authority of prison officials, who frequently exercised their authority to disapprove the drug companies' instructions to inmates.

REASONS FOR DENYING THE WRIT

I.

The Decision Below Was Clearly Correct

This is an action by prison inmates who were assigned to work at research clinics within the prison walls, rather than to some other existing prison industry (for example, the laundry facility). The Petitioners claim that the wages set and paid by the State of Michigan, which are comparable to and, in fact, somewhat higher than the wages paid to fellow prisoners doing comparable work on other prison assignments, are insufficient and that they should be awarded damages measured on the basis of minimum wage rates, which would be significantly higher than the wages enjoyed by fellow prisoners working in other prison industries.

In Count I of the Amended Complaint, it is claimed that such higher wages are payable by reason of the applicability of the Fair Labor Standards Act, 29 U.S.C. §§ 201-19. Under the Fair Labor Standards Act, however, it must be determined whether an employment relationship exists, and the well-established test for this determination is one of "economic reality". *Goldberg* v. *Whitaker House Cooperative, Inc,* 366 U.S. 28 (1961). Petitioners do not challenge the propriety or adequacy of this test but claim

that the application of this test to the extensive, uncontroverted facts in the record in this case should have resulted in a contrary decision. The essential facts here are that Petitioners, inmates of a state prison in Michigan, were assigned by the prison officials to perform tasks in research clinics within the prison walls owned by the State of Michigan, but operated by Parke Davis and Upjohn. The drug companies routinely supervise the work activities of the assigned inmates while they are within the confines of the clinics. It is the State of Michigan, however, and *not* Respondent drug companies, which "hires" and "fires" the inmates (with respect to their assignment to the clinics), controls the particular tasks to be performed and the hours to be worked, determines time off by the inmates, determines the amount of compensation and pays the inmates, and at all times maintains full custodial control over them.

The law is clear. The facts are clear. Applying the law to the facts, the District Court came to the conclusion that there was no employment relationship between the drug companies and the prison inmates within the meaning of the Fair Labor Standards Act, and the Court of Appeals for the Sixth Circuit agreed. The conclusion reached is in accord with *Huntley* v. *Gunn Furniture Co.*, 79 F. Supp. 110 (W.D. Mich. 1948) and *Hudgins* v. *Hart et al.*, 323 F. Supp. 898 (E.D. La. 1971), the only two reported decisions squarely in point. It is further clearly in accord with economic reality and common sense, and presents no deviation from the legions of decided cases dealing with the applicability of the Fair Labor Standards Act to particular fact situations.

Count IV of the Amended Complaint purports to raise issues under the Fourteenth Amendment. It is submitted, however, that no constitutional questions exist in this case.

Petitioners are prison inmates assigned to perform certain tasks in the clinic buildings within the state prison at Jackson, Michigan (for example, prepare food in the clinic kitchen), rather than being assigned to perform tasks in some other prison industry within the prison (for example, prepare food in the general prison kitchen). The inmates assigned by the prison authorities to work at the clinics are paid by the prison authorities at rates which are the same or somewhat higher than the rates for comparable work on other prison assignments.

Nevertheless, Petitioners claim to be constitutionally entitled to higher wages, vastly disproportionate as compared to the wages of fellow inmates performing similar tasks in other prison industries. The basis of this argument is the claim that the application of ordinary tort principles to an alleged violation of a Michigan statute should result in the recovery of money damages on a quantum merit basis. That is theory of Count III of the Amended Complaint.

Petitioners have not claimed a Constitutional right not to work while validly confined in the state prison. They do, however, appear to claim that they have some vague constitutional right not to be required to perform any tasks which are alleged to be in violation of a state statute designed to protect free labor from competition by prison labor.

It is submitted that the District Court in this case correctly rejected this contention when it held:

> "Yet, merely because penal officials have treated state prisoners at variance with the applicable state law does not, in itself, constitute a violation of the due process or equal protection rights of those prisoners. That was the precise conclusion reached by the Courts of Appeal for the Eighth and Ninth Cir-

cuits in two decisions which we elect to follow. *Draper* v. *Rhay*, 315 F.2d 193, 197 (9th Cir. 1963); *Sigler* v. *Lowrie*, 404 F.2d 659, 662 (8th Cir. 1968). If the rule were otherwise, every erroneous decision on state law matters would come before the federal court as a Constitutional question. *Hughes* v. *Heinze*, 268 F.2d 865, 870 (9th Cir. 1959)".

II.

There Is No Important Question Of Federal Law Involved

Stripped of the attempted emotional appeal, including the irrelevant references to Attica and to prison rebellions and uprisings, it appears that the only reason set forth in support of Petitioners' application is that they are dissatisfied with the determination of the case in the lower courts.

It is claimed in the Petition that questions raised in connection with Counts I and IV of the Amended Complaint in this case are "important" and "novel". Respondents respectfully submit that the real questions at issue here are neither important nor novel, nor come within the ambit of Rule 19.1(b) and that the lower courts correctly disposed of them. It is significant that in the thirty-four years since the adoption of the Fair Labor Standards Act, only three reported decisions have involved prisoners, *Huntley* v. *Gunn Furniture Co., supra; Hudgins* v. *Hart, et al., supra*, and the instant proceeding. It is also significant that the District Courts in all three cases have reached the same conclusions for the same reasons, *i.e.*, no Fair Labor Standards Act coverage because no employment relationship existed under the facts presented. Petitioners have represented that the "arrangement present between the Michigan Department of Corrections and Parke Davis and Upjohn has counterparts elsewhere in the United States,

so that the decision herein will have wide application." Respondents respectfully represent that, to the best of their knowledge, the arrangement at the State Prison for Southern Michigan (described in Appendix A) is unique. The decisions by the courts below have extremely little significance and appear to have application to the parties to this litigation alone.

CONCLUSION

It is respectfully submitted that there are no proper reasons (within Rule 19 or otherwise) to support the Petition for Writ of Certiorari. The lower courts correctly disposed of the case by applying clear and well-established principles of law, and certiorari should be denied.

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February 11, 1972

New laboratories of Upjohn and Parke-Davis stand between prison hospital and Cell Block 9 at State Prison of Southern Michigan, in Jackson, Mich.

RESEARCH

Drug tests behind bars

Upjohn and Parke-Davis have broken precedent in building their own labs in huge Jackson (Mich.) prison, where they can run better clinical tests than ever before on new drugs

If you wanted to test a new drug on hundreds of human volunteers who have much the same sort of life and who can be continuously supervised for months or years, what better place to look than in a prison?

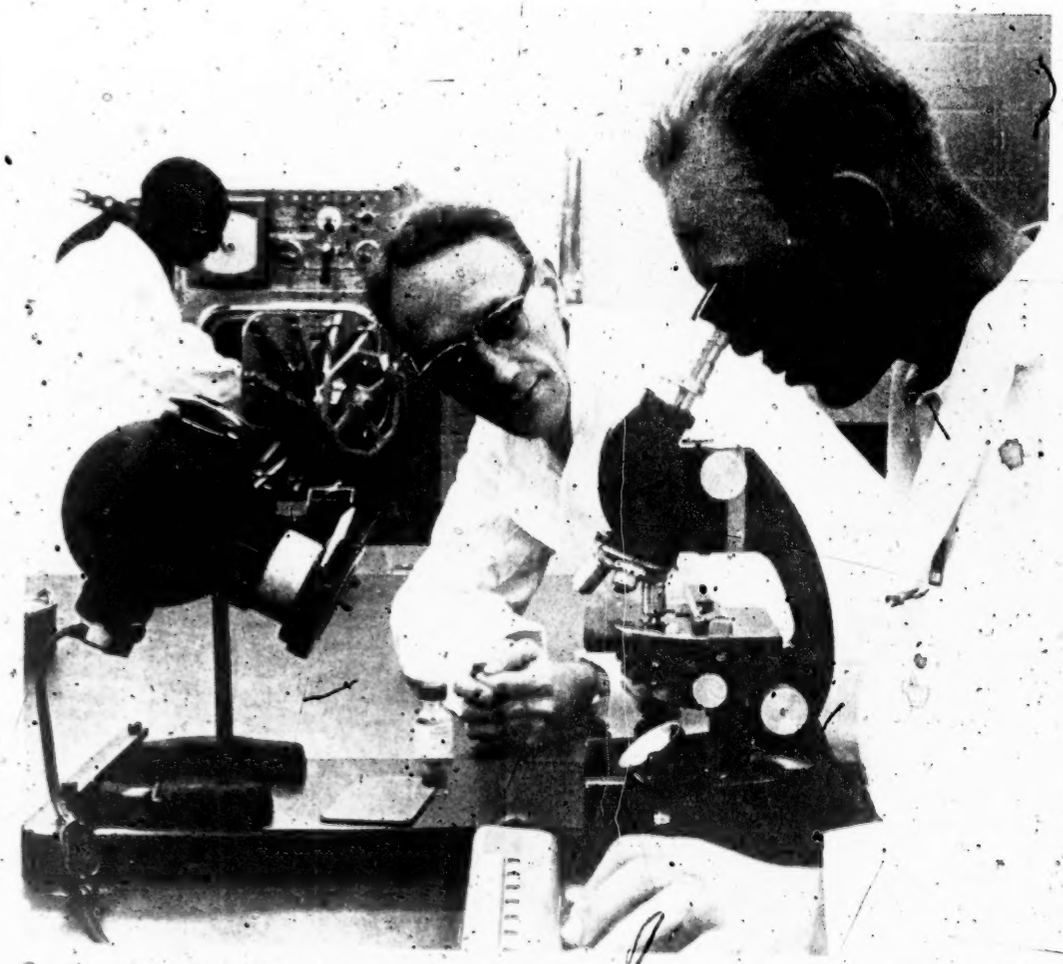
For many years, drug companies and the National Institutes of Health have had cooperative agreements with penal institutions all over the country, permitting them to run clinical tests on inmates. But they have generally been barred from installing labs at the institutions.

Now, Upjohn Co. and Parke, Davis & Co. have broken into prison in a big way, with half a million dollars' worth of lab facilities (pictures) at the State Prison of Southern Michigan. This prison, at Jackson, is rated as the world's largest walled penitentiary, enclosing 57 acres and 4,141 prisoners.

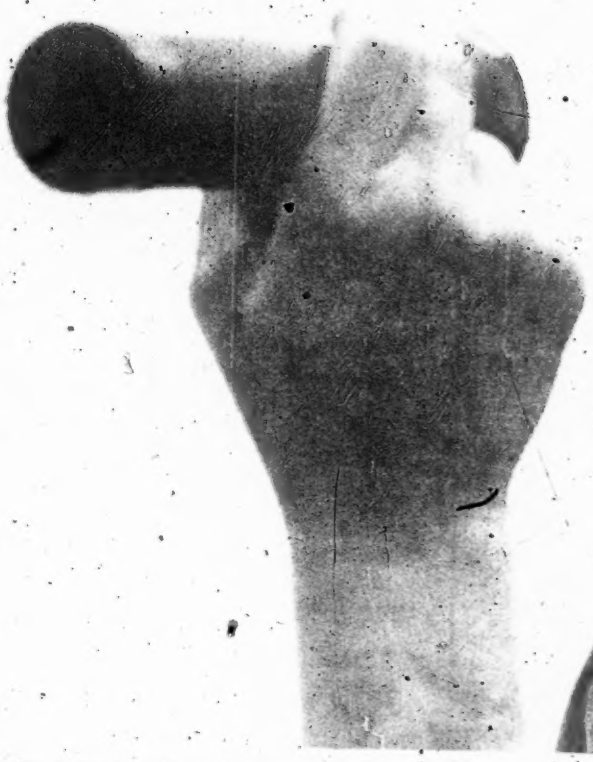
The two companies' laboratories, adjacent to the prison hospital, are said to be the first such facilities ever built by drug companies inside U. S. prison walls. They were completed this spring at a cost of $266,000 for Upjohn's labor and $226,000 for Parke-Davis, and title was then turned over to the state.

Research dream. From the outside, the two buildings, connected by a covered walk, aren't too impressive. Yet research people in both com-

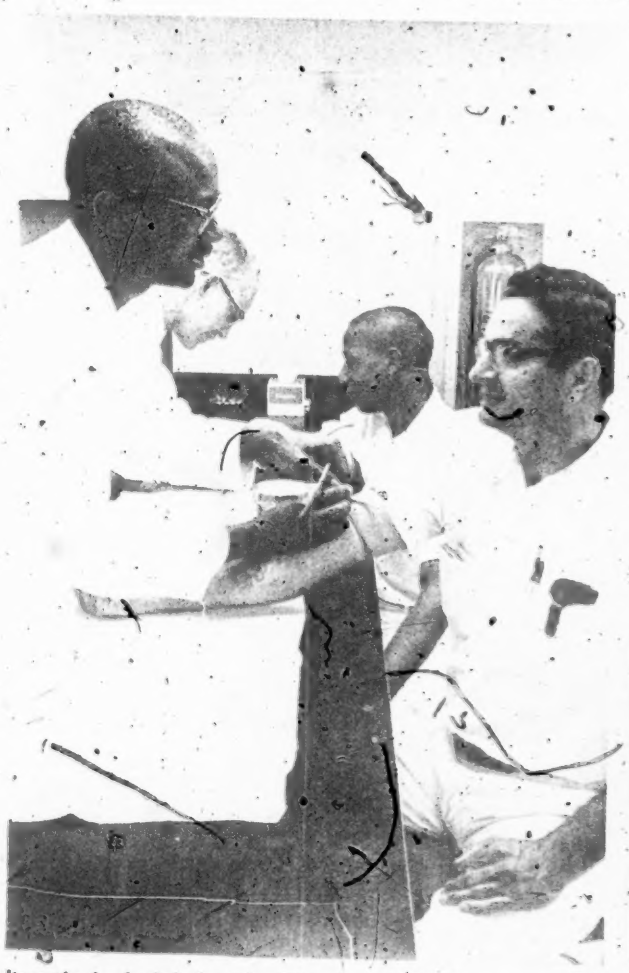
Prisoner's mouth is checked to be sure he



One inmate technician watches another counting blood cells. Inmates learn lab techniques; this gives them chance to gain skills useful in outside world.



swallowed pill. A tranquilizer, for example, can fetch two packs of cigarettes if it can be smuggled out to the yard



Inmate technicians take blood samples from prisoner volunteers in drug tests.

Guard checks volunteers into the waiting room of Upjohn's lab. Room seats 100 inmates, is made to look professional, cheerful.

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Gus Harrison, Michigan's director of corrections, pressed the lab idea

panies say the setup is a dream come true. It will permit, for the first time, what they call optimum control testing of new drugs.

The companies expect testing at Jackson to permit unsuitable drugs to be detected and discarded in as little as one month, compared with a standard three to five years for conventional clinical testing. They also expect far more accurate findings on how drugs affect cells and enzymes. The groundwork for a cure for the common cold or for cancer might well be laid at Jackson.

Drugs these days are accomplishing remarkable results partly because they are so much more powerful and so specifically formulated for their tasks. But as their potency increases, so does their inherent risk. Thus, accurate testing on human volunteers is ever more vital.

Personnel problem. It is also increasingly difficult to find enough volunteers—or even enough clinical investigators to test all the new drugs coming out of the laboratory.

With the spread of medical insurance, charity wards in hospitals are disappearing. These were traditionally an area for studies of new drugs as well as for the teaching of medical students. Drug tests can still be run in many private clinics in foreign countries, but companies admit a risk of inadequate controls and of a political backlash.

Through doctors who are prepared for clinical investigations, tests can also be run on patients all over the country, though it's a slower process than with prison volunteers and requires more contact work. There is a severe shortage of top researchers for routine testing jobs.

"There are a lot of doctors who are superb doctors," says Dr. Harold L. Upjohn, Upjohn's director of clinical research. "But they do not have the time, the knowledge (although they do not know it), or the patients to test drugs adequately."

Yet the drug companies must respond to the strict 1963 amendments to the Food, Drug & Cosmetics Act that empower the Food & Drug Administration to require a fuller accounting on all drug testing.

Finding an answer. Many a clinical test of a new drug turns up an aberrant finding that leaves the drug researchers uneasy even after the drug has been licensed. It might be a freakish reaction to a compound, a genuine effect of the drug, or a technician's sloppiness.

"We can never erase doubt in our own minds," a technician says. The prison labs are a step toward eliminating such doubts.

At Jackson, with laboratory facilities now available for substantial expansion of the testing program, Upjohn and Parke, Davis are tapping a rich source of volunteers for round-the-clock experiments under round-the-clock supervision. Prisoners are volunteering by the hundreds for testing purposes.

Willing, help. Many want the money, which ranges from a few cents to as much as $15 a day on a scale set by the prison board. Some are saving up for their parole period when a small bankroll can mean the difference—as it did for one prisoner recently, between getting out or being kept in prison for lack of a job or friends outside. Some send money to their families, too.

Prisoners also get a valuable feeling of self-respect. For some, it is the first time they have ever done anything to benefit society, some even

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learn the trade of lab technician, with a chance to find an honest job in a hospital later.

"I'm helping other people," says one inmate technician, "and I've never felt like this in my life."

Selling the idea. Testing of drugs in U.S. prisons dates back to 1906, when Pres. Theodore Roosevelt pressed for the first food and drug controls. It increased during World War II. Parke-Davis has been testing at Jackson prison for 30 years, Upjohn for eight.

Three years ago, Dr. Harold Upjohn broached the idea of company laboratories at the prison to Gus Harrison, director of the Michigan Board of Corrections. He and Harrison took the idea to the Prison Commission with the argument that research labs could be considered an extension of prison work shops and other activities geared to rehabilitation of prisoners.

The commission approved, and the state issued invitations to other Michigan drug companies to participate in the project. Parke-Davis accepted.

How it works. Under their agreement with the prison board, the companies are training inmates to run the tests that can be handled in the prison labs. Other tests are completed in their respective headquarters facilities, Parke-Davis in Ann Arbor and Upjohn at Kalamazoo.

The Board of Corrections decides which drugs may be tested at the prison. Each case is reviewed by a board of five doctors and a blue-ribbon committee, that includes the deans of the state's medical schools. Right now, the two companies are testing a broad range of drugs at Jackson, including anti-coagulants, analgesics, anesthetics, steroids, tranquilizers, and deodorants.

With their new ability to keep close laboratory controls on tests with prisoners, Parke-Davis and Upjohn expect soon to start testing drugs that have never been tried on human subjects. Tests at the prison are designed primarily to measure the toxicity of a drug, rather than its efficacy.

Initial doses are as low as 1/10000th of LD 50 (the lethal dose for 50 out of 100 laboratory animals, adjusted to man's weight). They are then built up gradually, to the point where adverse reactions appear.

Much faster. At Jackson, a large number of persons can be run quickly through the early stages of toxicity testing, revealing the specific reactions that must be explored. In the past, much of a researcher's time in checking on the toxicity of

Each volunteer gets a physical, and about half are eliminated from testing.

a new drug had to be spent in running around the country, coordinating clinical investigators.

"We're willing to stick our necks out on an unsuitable drug in a month now," says a Parke-Davis researcher. The Jackson project is hailed by Dr. P.F.R. de Caires, Parke-Davis director of clinical investigation, as a great aid to speed and accuracy in pinning down the areas for further study.

Since the lab opened, Parke-Davis has already eliminated two new chemicals designed to reduce blood cholesterol level.

Deeper, too. Dr. Upjohn is particularly interested in depth studies of a drug's reaction on a given prisoner, revealing basic facts about drugs generally. Upjohn is stressing two 10-bed metabolic wards at its lab for near-absolute control in drug studies that may last three or four days or several months at a time.

These studies will attempt to chart blood level, absorption and excretion of drugs, as well as toxicity, in selected healthy men. This is the element that is missing in many drug tests elsewhere.

"How can you tell when you test whole wards of little old ladies with broken hips if their reaction to a drug will be the same as that of a 17-year-old girl?" asks Dr. Alan Varley, manager of clinical research for Upjohn.

With prisoners, researchers can precisely set the odds in drug tests. "You can devote your entire attention to safety," says Varley, "and learn considerably more about a drug."

In the outside world, test subjects balk drug researchers at every turn, albeit unintentionally. "People are not reliable when they are asked to take medicine," Dr. Upjohn says. In a prison setup, they can be checked to be sure they have followed instructions precisely. **End**